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THE
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REPORTS.

CONTAINING ALL THE
IMPORTANT BANKRUPTCY DECISIONS
IN THE
UNITED STATES.

WILLARD S. GIBBONS,
EDITOR.

VOLUME XVIII.

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THE NATIONAL
BANKRUPTCY REGISTER
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VOLUME XVIII.

UNITED STATES CIRCUIT COURT—E. D. NEW YORK.

JUNE 11, 1877.

Certain creditors obtained a judgment against the bankrupt, and issued execution thereon to the sheriff, who at that time was in possession of the goods of the bankrupt, under an attachment issued in an action begun by other creditors. No formal levy was made by the sheriff under the execution. Within an hour thereafter the bankrupt's voluntary petition was filed. *Held*, That there was a valid lien under the execution, which was not affected by the dissolution of the attachment.

In re ARTHUR A. HULL.

THE facts appear in the opinion.

Taylor & Fowler, for petitioners.

Thos. D. Robinson, for assignee.

HUNT, J.—This is a petition for a review of the decision of the District Court in which the conceded facts are as follows:

A petition was presented to the United States District Court for the Eastern District of New York, and a motion made thereon by Collins, Downing & Co., for an order directing John C. Cutter, the assignee of the above-named bankrupt, to pay to the said Collins, Downing & Co. the amount of their claim in full upon the following statement of facts, agreed upon by counsel of the respective parties.

In re Hull.

"That on the 9th day of September, 1873, Collins, Downing & Co. docketed in the office of the Clerk of Kings County a judgment against the bankrupt for one hundred and fifty-eight dollars and sixty-two cents at 12.25 P.M. of that day.

"That at 12.30 P.M. of that day an execution was delivered to the Sheriff of Kings County on said judgment.

"That at the time of the delivery of said execution to the sheriff, the sheriff was in possession of the goods of the bankrupt by virtue of an attachment issued in a suit begun against the bankrupt by West, Call & Whittemore.

"That at 1.20 P.M. of the same day the petition of the bankrupt to be adjudicated a bankrupt was filed.

"That no actual possession of the bankrupt's property was taken by the sheriff independent of the attachment of West, Call & Whittemore, unless after the filing of the petition.

"It is further admitted that there are no other claims against the estate claiming security or priority, and that there are assets in the hands of the assignee sufficient to pay this claim."

"On the 3d day of May, 1876, at a Special Term of the said United States District Court, the Hon. Charles L. Benedict being present, an order was entered to the following effect, viz.:

On a motion having been made by Collins, Downing & Co. for an order directing John C. Cutter, the assignee of said bankrupt, to pay to said Collins, Downing & Co. the amount of their claim in full, now upon said motion and stipulation of admission as to facts made by the solicitors of the respective parties, and upon all the proceedings herein, after hearing Taylor & Fowler, solicitors for the petitioners, Collins, Downing & Co., in behalf of said motion, and Thomas D. Robinson, solicitor for John C. Cutter, in opposition thereto, it is hereby ordered, that the said motion be, and the same hereby is denied."

The attachment under which the sheriff held the property of the bankrupt was issued by virtue of a statute of the State of New York. (Code, Section 227.)

In re Hull.

It was the duty of the sheriff to seize the property of the alleged debtor, to take it into his possession, and to hold it as security for the satisfaction of such debt as should be recovered in the proceedings.

The general or ultimate property in the goods thus levied upon was in the debtor. Thus, if the attachment proceedings had been vacated, or upon trial the plaintiff had failed to establish his right of action, the title to the property, and the right to possession, free from lien or claim, would have existed in the debtor, and this without any affirmative proceeding on his part. The special property lien and control of the sheriff to and over the property are in the same character as in the case of an execution upon judgment. If the judgment in such case should be vacated, the special interest of the sheriff (unless there might be a lien for his fees) would cease, and the entire property would at once be in the debtor.

In the case of property levied upon, and held by a sheriff by virtue of an execution, it is well settled that when another execution is placed in his hands no new levy is needed, but that the first levy applies to, and is deemed to be made upon the second execution equally as upon the first. (*Cresson v. Stout*, 17 Johns., 116; *Russell v. Gibbs*, 5 Cow., 391.)

In *Birdseye v. Ray* (4 Hill., 158), speaking for the court, Judge Nelson says: "The object as well as the effect of an actual levy is to bring the goods into the possession, and under the control of the sheriff, for the double purpose of safe keeping, and to enable him by sale to apply the proceeds as payment of the debts. After the seizure they are in the custody of the law or one of its ministers, until the sale and delivery to the purchaser, and an actual levy under a second execution would be an idle formality."

We may assume the case then as one in which a judgment had been obtained, an execution issued, and a levy made, before the petition in bankruptcy was filed. *Wilson v. The City Bank of St. Paul* (9 N. B. R. 97; 17 Wall., 489), holds such a lien to be good against the bankrupt proceeding.

I am also of the opinion that the lien would have been

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complete, under the laws of New York, if there had been no levy by the sheriff before the petition in bankruptcy was filed. The statute of New York enacts, that upon the delivery of an execution to a sheriff the same becomes a lien, from the time of such delivery, upon all the personal property of the debtor within the county, as against every one except a purchaser for a valuable consideration, without notice of the execution, though no actual levy be made. (2 R. S., p. 336, 13 to 17; *Lambert v. Paulding*, 18 Johns., 311.)

It is argued, however, that to allow this levy to hold the property would be in violation of the spirit of the Bankrupt Law, which intends, it is said, an equal distribution among the creditors of all the bankrupt property. It is said, also, that the attachment was not vacated in favor of, or for the benefit of the execution debtor, but of all the creditors. No doubt the attachment, when declared by the Bankrupt Act to be dissolved if issued within four months before the commencement of the bankrupt proceedings, is dissolved for the benefit of the estate. But such dissolution does not affect any prior liens upon the property which are recognized by law.

The Bankrupt Act (Section 14) aims a particular blow at attachment proceedings as *mesne* process, and declares that if made within the preceding four months, the process shall be dissolved.

But it makes no such declaration as to an execution which is final process, or as to the lien of a mortgage. The effect of these liens is determined by a subsequent section (35th) and the *bona fides* of the security, with reference to the Bankrupt Act, furnishes the test of validity.

By the decision of the Supreme Court of the United States, already cited, an execution upon a judgment, obtained without the aid or connivance of a debtor, is valid under the Bankrupt Law. The judgment of Collins & Downing is not impeached as improperly obtained, and is therefore good in its claim as a fair lien upon the property of the bankrupt.

Nor am I able to see any force in the argument, that a defective levy upon an execution does not create a valid levy in

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favor of a subsequent execution. In this case the sheriff's possession under the attachment was perfect, in fact, and was good in law when the Collins execution was placed in his hands. The law then and there applied his possession and intent to the execution, and, although the first lien was declared to be void, I see nothing in the statute or in the principle to impair the lien of the execution.

Biesenthal's Case (15 N. B. R., 228), decided by Judge Johnson, is cited. That case, however, may well be sustained without interfering with the views here expressed. An assignment, good at common law, and valid by the laws of New York, had been made by the bankrupt before the petition was filed.

Under that assignment the entire property in the goods in question passed to the common law assignee. There was no interest left in the debtor to which the levy of an execution could attach. The execution, therefore, fixed no lien on the goods as in the present case, and when the assignment was vacated by the bankruptcy proceeding the goods came to the bankrupt assignee free from any lien or charge. The case is essentially different from one where the general property in the goods remains in the debtor, where an execution is levied upon that interest, and the goods came into bankruptcy charged with that lien.

Upon the whole case I am of the opinion that an order should be entered directing the assignee in bankruptcy to pay to the petitioner the amount of their claim proved against the bankrupt's estate, and it is ordered accordingly.

Smith et al. v. Krauskopf et al.

NEW YORK SUPREME COURT—FIRST DEPT.

MARCH, 1878.

Defendants, who were indorsers upon a promissory note, filed a voluntary petition before its maturity and proposed a composition at twenty-five cents on the dollar, which was accepted. The holders in no way participated in the proceedings, which were terminated before the note matured. The twenty-five per cent. was tendered to the holders in due time, but was rejected. In an action upon the note after maturity, *Held*, That defendants were liable for the full amount thereof; that their contingent liability was not affected by the composition.

J. G. SMITH et al., plaintiffs, v. ABRAHAM KRAUSKOPF et al., defendants.

Controversy submitted without action upon a general statement of facts.

Smith and Taylor, the plaintiffs, are the holders of a note for \$500 that matured February 29, 1876. Krauskopf and Gunsen, the defendants, are indorsers thereon, and this controversy is for the purpose of determining how much they are required to pay to satisfy and discharge their liability thereon. After the indorsement of the note, and before its maturity, Krauskopf and Gunsen effected a compromise with their creditors, under the provisions of the Bankrupt Law, at twenty-five cents on the dollar. Those proceedings were terminated and the composition paid before the maturing of the note in question. The plaintiffs claim that the liability of the defendants upon this note was not affected by the composition proceedings and that they are entitled to the full amount. The defendants insist that they are only required to pay \$125 in satisfaction of their liability, being twenty-five per cent of the amount of the note.

Dunne, Adams & Carr, for the plaintiffs.

The liability of the indorsers upon this note could not become fixed, so that it might be enforced by ordinary legal proceedings, until the maturing of the note and default of

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the maker. (*Musson v. Lake*, 4 How., 262; *In re Loder*, 4 N. B. R., 190.) Neither was the liability of the indorsers upon this note, before it matured and the maker made default, such that it was provable against their estate in bankruptcy. (U. S. R. S. § § 5067–5072 both inclusive; *In re Loder*, 4 N. B. R., 190; *In re Nickodemus*, 3 id., 230; *In re Crawford*, 5 id., 301.) Claims against an insolvent's estate under insolvent laws are, to some extent at least, analogous to those against a bankrupt's estate. Such a liability as is here the subject of consideration has been repeatedly held not provable under the insolvent law. (*Frost v. Carter*, 1 Johns. Cas., 73; *Mechanics & Farmers' Bk. v. Capron*, 15 Johns., 467; *Stowell v. Richardson*, 3 Allen [Mass.], 64.) Neither is a claim of this character discharged by a discharge in bankruptcy when it is granted prior to the maturity of the note upon which the bankrupt is an indorser. (U. S. Rev. Stats., § § 5117, 5118, 5119; *Pierce v. Wilcox*, 40 Ind. 70; *Robinson v. Pesant*, 8 N. B. R., 426; 53 N. Y., 419; *In re Gallison*, 5 N. B. R., 353; *In re Murdock*, 3 id., 146; *Ogden v. Saunders*, 12 Wheat., 213, 366.) Discharges granted under State insolvent laws are analogous to those in bankruptcy, and decisions with reference to the effect of such discharges aid in the determination of this question. (*Frost v. Carter*, 1 Johns. Cas., 73; *Mechanics & Farmers' Bk. v. Capron*, 15 Johns., 467; *Lansing v. Prendergast*, 9 id., 127; *Ford v. Andrews*, 9 Wend., 312; *Buel v. Gordon*, 6 Johns., 126; *The Rome Exch. Bk. v. Eames*, 1 Keyes, 588; 4 Abb. Ct. App. Dec., 83, 92; *Berry v. McLean*, 11 Md., 92; *Paxson v. Haster*, 11 N. J. L. [Hals.], 410; *Stowell v. Richardson*, 3 Allen [Mass.], 64.)

Melville H. Regensburger, for the defendants.

BRADY, J.—The question presented by this appeal and decisive of the plaintiffs' right to recover is whether the defendants could anticipate a contingent liability, as indorsers; convert it into an existing debt or liability and secure a discharge from it by proceedings under the Bankrupt Law. (Section 5103

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A., 22d June, 1874, § 17, known as a composition, proposed and accepted.) The defendants were indorsers of a promissory note, and before the note matured the proceedings were accomplished. They set forth the note in their statement of debts, and tendered the twenty-five per cent. accepted to the plaintiffs in due time, but it was rejected.

The plaintiffs neither proved nor offered to prove any claim in bankruptcy against the defendants, and did not, so far as revealed, in any way participate in the proceedings mentioned. The defendants were not bound as indorsers until the failure of the maker to pay. They could waive notice of presentation and of non-payment and all other ceremonies which should be observed to make their contingent liability absolute, but the maker must fail to pay before their obligation matures. He is primarily liable, and if he pays the indorsers are discharged, no matter what they have said or done in regard to the claim. It may be that the insolvency of the maker would have some effect upon the determination of the question discussed, but that fact does not appear, and we cannot assume it to have been the case. For aught that appears, the assumption of the note by the defendants was entirely gratuitous, and took away from legitimate creditors whose debts were due some portions of the defendant's estate, which being left would have increased the sum to be paid in composition. There is no statement that the maker could not pay.

✓ Section 5069 contemplates the obstacle from contingent liabilities. It provides as follows: "When the bankrupt is bound as drawer, indorser, surety or bail, or guarantor upon any bill, bond, note or any other specialty or contract, or for any debt of another person, but his liability does not become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability becomes fixed and before the final dividend." The reason for this is apparent, and is what has been suggested, namely, the primary debtor may pay the debt, and thus absolve the surety, guarantor or indorser. It is further provided (§ 5072) that no other debts than those specified in the five preceding sections, shall be

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proved or allowed against the estate. The defendants' contingent liability was not one of the debts specified which could be proved or allowed against the estate, and could not be discharged by the composition for the same reason. It was not a debt or liability which had "become fixed" at the time the decree in favor of the defendants was rendered. The State insolvent laws being analogous to those in bankruptcy, may be invoked in determining whether such a liability would be discharged. Our statute provided that a discharge under the insolvent laws should be a bar to all debts of the insolvent, whether due or to become due, which existed at the time of the insolvent's assignment. Yet it was held that when the insolvent was indorser on a note not due when his petition was filed, his discharge was no bar to an action on the indorsement after he had been properly charged as indorser. (*Rome Exch. Bk. v. Eames*, 1 Keyes, 597. See, also, *Mechanics & Farmers' Bk. v. Capron*, 15 Johns. 467; *Ford v. Andrews*, 9 Wend., 312.) In illustration of this doctrine, the section referred to declares only that the provisions of a composition accepted shall be binding on all the creditors whose names and addresses and the amounts of *the debts due* to whom are shown in the statement of the debtor produced, etc.: The contingent debt of the defendant, incurred by the indorsement, had not become due from the defendants. The note had not matured when the proceeding was consummated.

It may be that the defendants, by analogy to the mode in which bankrupts are relieved as to contingent obligations (§ 5069, *supra*), could apply upon the maturity of their indorsement to have it included in the composition in accordance with the provision made for it by the resolution of the creditors, but of that it is not necessary for this court to declare its views. Without, however, pursuing the subject further, it is quite clear that the plaintiffs are entitled to judgment.

DAVIS, P. J., and DANIELS, J., concurred.

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UNITED STATES DISTRICT COURT—S. D. NEW YORK.

MAY 17, 1878.

It is within the power and is the duty of the court to set aside summarily any process obtained by fraud and deception practiced upon itself. The exercise of this power is absolutely essential to the purity of the administration of justice.

Where verified petitions are presented purporting to be in the form required by law, and the petitioners know facts sufficient to put them on inquiry, and such verifications are false, such petitions will be summarily dismissed, and all concerned in preparing and presenting them will be subject to the grave consequences which result from the practice of fraud and deception on the court.

Co-petitioners cannot be held innocent of and not privy to the fraud and falsehood practiced in their name by their co-petitioners, unless their innocence clearly appears. Petitions in bankruptcy proceedings are to be considered as the joint act of all the petitioners.

The provision of the statute allowing amendments to petitions was not intended to allow creditors recklessly and falsely to make and swear to their petition, which they know to be false, and then to have others join in and carry it on.

The acts of the State Courts, done in the due exercise of their jurisdiction, not conflicting with the proper decrees and jurisdiction of the Federal Courts, are valid and binding on the Federal Courts.

The injunction order issued on a creditor's petition should conform to the language of the statute.

*In re RAPHAEL KEILER, LEOPOLD WORMSER,
and HERMAN KINGSBURY.*

The facts appear fully in the opinion.

Richard S. Newcombe and Albert Cardozo, for alleged bankrupt Keller.

Gershon A. Seixas, David Leventritt, and William F. Shepherd, for alleged bankrupts Wormser and Kingsbury.

Alexander Blumensteil, for petitioning creditors.

Melville H. Regensburger, for the receiver.

CHOATE, J.—On the 7th day of May, 1878, upon a petition signed by six parties, and verified by the first five of them, alleging in due form that they were creditors of the firm of Keiler, Wormser & Kingsbury, and that they verily believed that they constituted one-fourth in number of all the creditors of said firm whose claims were provable in bankruptcy, an

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order to show cause why the said copartners should not be adjudged bankrupts was issued, returnable May 18.

The petition alleged several acts of bankruptcy, the concealment of property so that it could not be taken on legal process, the fraudulent suspension of commercial paper and the procuring of the property of the debtors to be taken on legal process, and the petition was accompanied by the usual affidavits of the several petitioners to their several claims against the firm as set forth in the petition, and by affidavits to the acts of bankruptcy.

The act of bankruptcy alleged as the procuring of the debtors' property to be taken on legal process was, "that the debtors being insolvent and in contemplation of insolvency, did, on the 7th day of May, 1878, procure their property to be taken on legal process, with intent by such disposition of their property to defeat and delay the operation of the Revised Statutes, etc., title Bankruptcy, in that on or about the said day the said firm applied to one of the Justices of the Supreme Court of the State of New York for the appointment of a receiver of all their partnership effects, and an order was, on the 7th day of May, 1878, made by said court, appointing one Fred. Lewis as receiver."

The accompanying affidavits showed that the receiver had been appointed, but had not given bond nor qualified, nor taken possession of the property.

The fraudulent suspension of commercial paper was alleged with regard to two notes maturing on the 4th of May, 1878, which it was averred the firm had abundant assets to pay, but that they refused to pay the same; and an injunction was asked for and issued, on this petition and these affidavits, restraining the party so appointed receiver from taking possession of the firm property, besides the usual injunction restraining the debtors and all other persons from interfering with the property otherwise than to preserve the same.

A motion is now made, on behalf of Keiler, one of the alleged bankrupts, that the order to show cause and the injunction be vacated, and the petition dismissed, on the ground,

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among others, that the verification of the petition was knowingly false on the part of the petitioning creditors at the time it was made.

This motion was heard upon affidavits, and upon all the papers used in the Supreme Court on the motion for the appointment of a receiver, and among these papers was a petition or request to the Supreme Court, in which all these petitioning creditors united with other creditors of the firm in the course of the proceedings in that court.

This petition or request was to the effect that the court should appoint as receivers the alleged bankrupts Wormser and Kingsbury, and it was signed by thirty-five creditors of the firm, two of the petitioning creditors in this court having signed it, one in the eighteenth and the other in the thirty-second place in the order of the signatures respectively.

It also appeared by the papers that one of the petitioning creditors—the same who signed the said petition or request in the eighteenth place—had made an affidavit used in the action in the Supreme Court, stating, among other things, that he was the bookkeeper of the firm, and that the whole number of creditors of the firm was forty-three.

A motion was also made by the alleged receiver, on the papers on which the injunction was granted, to modify the same by striking out that part of the order specially restraining the receiver from taking possession, on the ground that the injunction in that respect was one which this court could not legally or properly grant, and that on the petition and affidavits the receiver's title appeared to be a vested title, that by operation of law on the facts stated he was in possession, and that therefore this court could not divest him of the possession of the property, nor should by injunction restrain him from taking possession of it. Both motions have been heard together.

The petitioning creditors, to meet the motion to dismiss the petition, have produced the affidavit of one of said creditors, being the same person who signed, as the thirty-second, the petition or request presented to the Supreme Court, to the

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effect that the petition was presented and is intended to be prosecuted in good faith.

The petitioning creditor who was also the bookkeeper makes an affidavit used by the petitioning creditors in opposing this motion, but he makes no explanation of his inconsistent oaths—the one in this court and the one in the State Court—except that he says he did not know how many creditors would sign and verify the petition after him ; and both of these petitioners alleged that they acted under the advice of counsel.

Another of the petitioning creditors makes affidavit to what occurred in the Supreme Court at the hearing before the Judge at 2 o'clock on the 7th of May, a few hours before he verified the petition, at which hearing counsel urged the right of these thirty-five creditors, of whom he was one, to be heard ; but he says nothing as to his good faith in making his verification to the petition.

The other three petitioning creditors make no affidavits, but on behalf of the petitioning creditors is presented a great mass of papers, most of which were used in the actions in the Supreme Court, which, it is claimed by the counsel for Wormser and Kingsbury and their creditors, tend to show that the action of Keiler and his attorneys in said actions in the Supreme Court have been oppressive to his copartners and to the creditors of the firm especially in procuring the appointment of an unsuitable person, as it is claimed, as receiver ; and that the action of the court in the appointment of the receiver was oppressive and unjust ; that Keiler has no real interest in the property, and has been guilty of gross violations of the partnership relation, and has improperly withdrawn the funds of the partnership ; and that his action and the proceedings therein were parts of a plot arranged between him and said Lewis and other persons to ruin his copartners and get possession of the property of the firm ; as to all which matters it is proper to say there are on the other side counter statements, denials, explanations and re-recrimination, the merits of which I have had no occasion to examine.

It appears from these papers that the suit of Keiler against

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Wormser and Kingsbury was commenced April 25th, 1878, and on the same day an injunction was granted against their interfering with the firm property, pending the decision of the plaintiff's motion for the appointment of a receiver.

That on the 27th of April Wormser and Kingsbury commenced an action against Keiler, and obtained an injunction against him from interfering with the firm property pending the motion of the plaintiffs in that action for the appointment of a receiver; that each of the parties, in their complaint, charged against the other party various acts injurious to the firm and acts in violation of the duties of partners.

Both motions for the appointment of a receiver came on before the same judge who had granted the injunctions on the 6th of May, and he, after a hearing, announced in writing, on the 7th of May, his decision or opinion, which concluded as follows: "Fred. Lewis appointed receiver, bonds \$100,000." The formal order was not signed by the judge till the next day, the 8th of May, and when signed, it was dated as of the 7th of May.

At one o'clock on the 7th of May notice was served on the attorney of Wormser and Kingsbury for the settlement of the order at 2 o'clock the same day.

All the parties appeared, and the counsel for Wormser and Kingsbury asked and obtained a delay of the settlement of the order till the 8th of May, at 10 o'clock, to prepare amendments to the proposed order.

On the same afternoon, May 7th, the creditors' petition in bankruptcy was prepared and presented to this court by different counsel, and the order to show cause thereon and the injunction were issued by this court and served on the alleged bankrupt, Keiler, and his attorneys and the said Lewis.

It is insisted on the part of said Keiler that the adjournment of the settlement of the order was asked for and obtained deceitfully and for the purpose of commencing these proceedings in bankruptcy.

This is denied under oath by the counsel who asked for and obtained the adjournment, and I give full credit to his statement to that effect.

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It is evident, however, that the delay thus obtained was availed of by some of the creditors, who had asked the appointment of Wormser and Kingsbury as receivers, and who felt aggrieved by the appointment of Lewis, for the purpose of preparing and presenting the petition and obtaining the injunction now in question, and this was done with the aid and knowledge of Wormser and Kingsbury.

It does not seem to me that the fact that the delay so obtained was thus availed of would be a sufficient reason for this Court's declining the jurisdiction of the petition or dismissing it.

If it was, as is suggested, any indignity to the State Court, this court cannot punish for it, and if the proceedings of this court are regular, the motives of the parties in instituting the proceedings are immaterial, nor is it any objection to the regularity of these proceedings that the alleged bankrupts, Wormser and Kingsbury, promoted and advised them.

There is no doubt, however, of the power and duty of this court to set aside summarily any process obtained by fraud and deception practiced upon itself. (*In re Scammon*, 11 N. B. R., 280.)

The exercise of this power in proper cases is absolutely essential to the purity of the administration of justice.

No party, whatever may be the merits of his case otherwise, can take or hold any benefit from process so obtained.

The power, however, should not be summarily exercised upon motion, unless the fact of the alleged fraud or deception is admitted or proved beyond question.

If there is the slightest question of that fact, opportunity should be given for a determination of the fact by a reference or a trial in a proper and deliberate manner.

In this case it stands confessed as to two of the six petitioners that their verification of the petition was knowingly false.

They swore and were required to swear to the truth of the averment that they believed the six petitioners were one-fourth in number of all the creditors of the firm.

One of them is shown to have signed a petition of creditors

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only five days before, in which his name appears as the thirty-second name in the order of signature.

The authenticity of this paper is not denied, and all that he or his counsel are able to urge in extenuation of this obviously false verification of this petition, is that he did not know how many would sign the petition after he signed and verified it:

The other is shown to have been the bookkeeper of the firm, intimately acquainted with their books and business, and to have sworn, a few days before, that the whole number of creditors was forty-three. He makes an affidavit, but attempts no excuse except that he did not know how many would sign after he had signed and verified.

The authenticity of his affidavit to the number of the creditors is not denied, and it is obvious he can neither deny nor explain the falsity of his verification.

It is obvious therefore, as to these two petitioners, that they are self-condemned. They have made their own case, and it shows conclusively that their verification, on which the order and injunction were obtained, was knowingly false.

The explanation made on their behalf—that they expected or may have expected other creditors to sign after they had signed and verified the petition—while it may mitigate the moral turpitude of their act, cannot for a moment be allowed to affect the result, so far as they are concerned.

It does not alter the fact that the verification made by them, when made and put in the hands of their attorney, was knowingly false, nor that that false verification was used by and on behalf of the petitioners to procure the order and injunction.

And if the explanation excused the moral or the legal turpitude of the false oath, the very fact urged in excuse would be fatal to the maintenance of the petition so far as they are concerned, since in the case supposed, and assuming that they expected the requisite number to sign before the petition was presented, on which assumption alone the excuse has any meaning, they never consented, nor with the knowledge of the facts that they had could they innocently consent, to the petition being presented to the court until the requisite number of cred-

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itors had become parties to it, and this never having been done the petition was not presented with their consent, and neither before its presentation could they, without an act of deception towards the court, consent to its presentation, nor since its presentation, without such deception, could they ratify what was done for them. So that as to them in the case supposed the petition was filed and presented without their authority, if their attempted excuse is of any account.

It is urged at the bar that, from the necessity of the case, creditors' petitions are often hurriedly prepared, and that a practice obtains of having creditors sign and verify, with the understanding that other creditors, to the requisite number and amount, shall afterwards sign; so that when presented to the court the petition shall in fact conform to the statute in respect to the number of the petitioning creditors and the amount of their claims.

But it is perfectly plain that such a practice, if it has ever existed, is in direct violation of the statute, which requires the petition to be joined in by such number of creditors as constitute, or believe themselves to constitute, one-fourth in number and one-third in value, and to be verified by the petitioning creditors before any order to show cause or injunction can issue, or, if there are more than five, by the first five signers of the petition.

It is perfectly plain that the petitions prepared in the manner above referred to are not, in fact, verified as required by the statute. When the verification is made it is false in fact and no verification to the petition as in fact presented is actually made, although on the face of the paper it purports to have been made.

The requirement of the statute as to verification is a safeguard thrown around the rights of property of the citizen.

Without such verification of the petition in the very form in which it is presented to the Court, the law does not allow the issue of this process which results, or may result, in depriving citizens of the enjoyment and use of their own property, and in its sequestration for the benefit of their creditors.

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It is, therefore, matter of substance and of right, and is not to be dispensed with under cover of an apparent compliance with the act.

This practice, if it has ever existed to any extent, has obtained without the knowledge or suspicion of its existence on the part of this Court, and it may as well be understood that such practice will not only subject the petitions so prepared to summary dismissal, but will render all concerned in preparing and presenting them subject to the grave consequences which result from the practice of fraud on the court.

No considerations of urgency or of importance to the parties of the relief sought by the petition, or of danger of losing the benefit of the act, can excuse such practice to any extent, or under any circumstances.

It is urged, however, that the other four petitioning creditors are innocent of the fraud; that it does not appear that they knew that the six did not constitute one-fourth in number of the creditors of the firm, and it is insisted that the petition is good as to them, and that the motion to dismiss should therefore be denied, especially as a supplemental petition has been filed, signed by a very large number of creditors, making with the four a large majority of all the creditors.

It is true that it is not certain on the evidence that the other four creditors at the time of their signing and verifying the petition knew that the averment that the petitioning creditors were one-fourth in number of all the creditors was false. Enough appears to show that they probably knew it. Since the 25th of April it appears that this litigation has been active and bitter. Before this petition was signed these four creditors united with the other creditors in requesting the Supreme Court to appoint Wormser and Kingsbury as receivers; that request was signed by these four and thirty-one other creditors.

It is improbable, upon the ordinary presumptions that must be drawn from the acts of parties in respect to their knowledge of their own affairs, that they were ignorant of the principal facts, as to the number of creditors and the amount of their claims, freely and publicly used in their own behalf in applica-

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tions to the court in that litigation; one of the four also attended before the judge on the 7th of May, when counsel asked to be heard for these thirty-five creditors, and I am strongly inclined to think that co-plaintiffs or co-petitioners, in whose name and for whose benefit jointly with other plaintiffs or petitioners false and fraudulent papers have been presented to the court, cannot be held innocent of and not privy to the fraud and falsehood, where they are confronted with the conclusive evidence of the falsehood and fraud practiced in their name by their co-plaintiffs or co-petitioners, on a motion to vacate the proceedings by reason of the fraud, if they do not at the least declare themselves by affidavit innocent of the deception, and especially if they make affidavits and do not disavow the fraud.

But however this may be, and assuming that if the petition could stand as the petition of the four, the doubt on this point must lead to an inquiry, by reference or otherwise, as to the participation of the other four in the fraud practiced on the court, I am clearly of opinion that the motion to dismiss must be granted, on the proof of fraud as to the two petitioning creditors whose verification is conceded or conclusively shown to have been false. If the statute authorized any creditor or creditors, and not any particular proportion in number and value, to institute this proceeding, there would be ground for the argument that if the four innocent petitioners successfully disavowed the fraud practiced in their name, they might be permitted to continue the proceedings after striking out the petitioners guilty of the fraud; but that is not the case. The statute authorizes creditors jointly constituting one-fourth in number and one-third in value to institute and carry on the proceeding. The case is the joint case of all the petitioners. The court cannot entertain jurisdiction and issue the order to show cause unless it be alleged that the petitioners—that is, all of them jointly—are or believe themselves to be such one-fourth in number, and before any order can issue it is essential that this averment shall be supported by the oaths of all the petitioners, or, if they are more than five in number, by the oaths

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of the first five signers, to the truth of the petition. If, therefore, the verification of two of the five is set aside and shown to be a nullity, as knowingly false, there does not remain a petition conforming in substantial respects with the requirements of the statutes upon which any order can issue or any relief be given. The verification of the other four is not a compliance with the statute. It is impossible therefore to separate the true from the false, so that the petition can be sustained.

That which appears on the face of the papers to be a compliance with the statute, and which justified the issue of the order to show cause, is a sham. It produced the appearance of jurisdiction for the issue of the order and injunction, when in reality there was no jurisdiction. The case is not a proper one for amendment. Verifications have been allowed to be amended, but how could these verifications possibly be amended? There is not one of the petitioning creditors who could now take oath to the truth of that petition. Amendment is neither possible nor proper in such a case. Amendments are allowed to correct innocent mistakes where parties have acted in good faith, and they are also allowed only to conform the papers to the facts. Here the only amendment possible on the facts would be to strike out all the verifications and part of the material averments of the petition. (As to amendments see *In re Hanibel*, 15 N. B. R., 233; General Order No. 7.)

The statute provides that if it appears that the requisite number of creditors have not joined in the petition, other creditors may join in such petition within a time allowed by the court, not exceeding twenty days. I think this provision is intended to meet the case of a petition originally filed in good faith, where, by reason of their ignorance of or misinformation as to the number of creditors, the petitioners have been led to believe that they constituted the requisite proportion, and have so sworn. I do not think it was intended or can be so construed as to allow creditors recklessly and falsely to make and swear to their petition which they knew to be false, and then to have others join in and carry it on. It is however insisted that the

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court will, in its discretion and in furtherance of justice, deny the motion to dismiss the petition on the ground that it appears, as is alleged, that, unless adjudication shall be made on the basis of this petition, filed the 7th of May, the alleged bankrupts Wormser and Kingsbury and their honest creditors will suffer great and irreparable injury through the proceedings in the State Court and the appointment of the receiver by that court, and through what has been declared by their counsel to be the oppressive and unjust proceedings of the State Court. The suggestion is based upon a total misconception of the true relations of the Federal to the State courts.

Whenever the jurisdiction of the Court of Bankruptcy is properly and in good faith invoked in the manner prescribed by the Act of Congress, the court is bound to assume and exercise that jurisdiction. It cannot be properly refused, and it is not a matter of discretion. The orders and decrees of the court, duly made in the exercise of that jurisdiction, are binding and controlling on all persons; and the State Courts can do no act and make no decrees or orders that shall nullify or prevent the free execution of the lawful decrees of this court, nor create any rights which impair or abridge any rights or interests which are created under the lawful orders of this court. But with the acts of the State Courts, done in the due exercise of their jurisdiction, not conflicting with the proper orders, decrees and jurisdiction of the Federal Courts, the Federal Courts have nothing whatever to do. Such acts are wholly outside of the cognizance of the Federal Courts. They cannot directly or indirectly, without the most obvious impropriety, undertake to declare, recognize or base any action of their own upon the supposed or alleged impropriety of acts of the State Court done within the proper and exclusive range of their jurisdiction. To do so, or to attempt to do so, would be irregular, impertinent, and fraught with great public mischiefs.

The appeal, therefore, that has been made to this court in the present case, to allow its action in this matter to be affected in any way by the alleged oppression or failure of justice to which the alleged bankrupts, Wormser and Kingsbury, or their

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creditors, may have been subjected in the proceedings of the Supreme Court of New York, is entirely futile. That is a matter with which this court has absolutely no concern. If the parties are so aggrieved, the constitution and laws of New York give them their redress; or if not, the Federal Courts are not established for any such purpose, and can neither form nor give effect to a judgment thereon. They were not established to protect the people of New York against their own courts, and can only assume, upon the principles of comity, that all things done by other courts exercising an independent jurisdiction, within the proper limit of that jurisdiction, are done rightfully and in the due and proper administration of justice.

I must decline, therefore, to entertain any question concerning, or to express any opinion upon, the alleged improper, unjust and oppressive acts of the State Court, or to permit the alleged existence of such facts to control in any way the action of this court even in a matter of discretion, if such it is, upon which I am called to act; and the fact that no opinion is here expressed on the question raised, as to the propriety of the conduct of a judge of the State Court, must not be deemed by implication a reflection upon the proceedings of that court, because in my view of my duty I think I am bound as a judge of this court not to take the matter into consideration at all and to avoid all expression of opinion thereon.

It is, however, still urged that it is the obvious interest of all the creditors of the firm and of the two partners, Wormser and Kingsbury, who alone, it is said, have any real interest in the property of the firm, that this creditors' petition should stand, in order that in case of an adjudication the title of the assignee may relate back to the time of the filing of this petition, and that it is ruin to them all to have this petition now dismissed.

Even if the misfortune were as great as it is represented, still the petition must be dismissed. As to either of the alleged bankrupts, it is his right to have the order to show cause and the injunction set aside; for as to him the petition never was right-

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fully and truly sworn to in compliance with the statute, and I see no way in which the petition can, by amendment or otherwise, be made the basis of any other order to show cause; and as to the court, it is a matter affecting its honor; and to protect the court and its suitors against the like imposition the petition should be dismissed, since it was by fraud and perjury made the instrument by which the court was induced to grant the orders to which the parties were not entitled, and but for their false oaths would not have obtained; and if the court should, in a single instance, for the sake of saving parties from apprehended loss or damage, become a consenting party to such a transaction, the effect would be more disastrous to public and private interests than the wreck of many fortunes.

Other important and interesting questions were discussed by the learned counsel, but the disposition of the case makes it unnecessary to determine them. I am satisfied, however, that the injunction issued in this case, in so far as it deviated from the form of injunction ordinarily issued on a creditors' petition, in the language of the statute, which restrains the debtor and any other person from making any transfer or disposition of any part of the debtor's property not excepted by the Bankrupt Law from the operation thereof, and from any interference therewith until the hearing on the petition, was unnecessary and not in accordance with the practice of the court; and without determining how far such receiver is subject, after the filing of the petition, to the jurisdiction of this court upon the facts disclosed in this case, I simply say that the injunction issued in this case is not to be deemed a precedent in any other case of the like kind.

Order to show cause and injunction vacated and set aside and petition dismissed.

In re Smith et al.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

MAY 29, 1878.

The liability of a factor for the proceeds of goods consigned to him for sale is released by his discharge in bankruptcy.

One of the bankrupts was arrested under an order of arrest granted by a State Court in an action founded upon a claim against the bankrupts for the proceeds of goods consigned to them for sale as factors. *Held*, That he was entitled to be discharged from such arrest.

In re ABNER E. SMITH, ADDISON B. GETTY, LEVI P. LYON, and FREDERICK W. GETTY.

Ward, Clark, & Angell, for bankrupt.

CHOATE, J.—This is an application on behalf of Smith, one of the bankrupts, to be discharged from arrest under an order of arrest granted in an action in the Supreme Court of the State of New York. June 30, 1877, the petitioner and his copartners were adjudicated bankrupts on petition of creditors.

The arrest was made under an order dated February 5, 1878, pending the proceedings in bankruptcy, and the petitioner is now held to bail.

The petitioner is entitled to be discharged, provided the cause of action on which he has been arrested is a debt from which his discharge in bankruptcy, if granted, will release him. (*In re Glaser*, 1 N. B. R., 336.) The debt for the recovery of which the action was brought, as set forth in the affidavit on which the order of arrest was granted, occurred prior to the filing of the creditor's petition against the bankrupts, and is a claim against them for the proceeds of goods consigned to them for sale as factors.

The Bankrupt Law of 1867, Section 33, provided that "no debt created by the fraud or embezzlement of the bankrupt or by defalcation as a public officer, or while acting in a fiduciary capacity, shall be discharged under this act."

There has been considerable conflict of authority as to whether a claim against a factor, for the proceeds of goods con-

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signed to him for sale, was protected under this section from the effect of a discharge.

It was early held in this district by Judge Blatchford and Mr. Justice Nelson, after a very careful examination of the question, that such a debt was not discharged. (*In re Seymour*, 1 N. B. R., 29; *In re Kimball*, 2 N. B. R., 204, 354.) The same construction of the act has been declared in other districts, and in some of the State Courts. Other cases, however, of great authority, have held the contrary (*Grover et al. v. Clinton* 8 N. B. R., 312; 5 Biss., 324; *Owsley v. Cobia* 15 N. B. R., 489); and in *Neal v. Clark* 5 Otto, 708, *sub nom. Neal v. Scruggs* 17 N. B. R., 102), the Supreme Court of the United States appears to approve the construction given by that court to the corresponding section of the Bankrupt Act of 1841 in the case of *Chapman v. Forsyth* (2 How., 202), as applicable to the 33d Section of the Act of 1867. The Act of 1841 excluded from its benefits "all persons owing debts created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity."

In *Chapman v. Forsyth* it was held that the debt due from a factor for the balance of his account was not a fiduciary debt within the meaning of the act, that the words "*other fiduciary capacity*" must be construed to refer to trusts or fiduciary relations of the same kind as those enumerated, that is, public officers, executors, administrators, guardians, and trustees.

The decision of the case *In re Kimball* proceeded upon the theory that the 33d Section of the Act of 1867 was much broader in its terms and meaning than the corresponding Section of the Act of 1841.

The language of the Act of 1867 was, "no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this Act." In *Neal v. Clark* (5 Otto, 704, *sub nom. Neal v. Scruggs*, 17 N. B. R., 102) the Court of Appeals of Virginia had held that the liability of one who purchased with notice, from an executor, at a discount, a part

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of the assets under the circumstances which made it a *devastavit* on the part of the executor so to dispose of them, but without actual fraud on the part of the purchaser, was not discharged from his liability by a subsequent discharge in bankruptcy.

The Supreme Court of the United States reversed the judgment, on the ground that the "fraud" intended by the statute is actual, and not constructive fraud, and they make the following observations on the construction of the Act of 1867:

"The Bankrupt Act of 1841 exempted from discharge debts 'created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any fiduciary capacity.'

"The question arose under that act whether a factor who had sold the property of his principal, and had failed to pay over the proceeds, was a fiduciary debtor within the meaning of that clause.

"This court in *Chapman v. Forsyth*, said: "If the act embrace such a debt, it will be difficult to limit its application. It must include all debts arising from agencies, and indeed all cases where the law implies an obligation from the trust reposed in the debtor.

"Such a construction would have left but few debts on which the law could operate.

"In almost all the commercial transactions of the country confidence is reposed in the punctuality and integrity of the debtor; and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the first section of the act. The cases enumerated, 'the defalcation of a public officer,' 'executor,' 'administrator,' 'guardian,' or 'trustee' are not cases of implied, but special trusts; and the other fiduciary capacity mentioned must mean the same classes of trusts. The act speaks of technical trusts, and not those which the law implies from the contract. A factor is not therefore within the act.

"A like process of reasoning may be properly employed in construing the corresponding section of the act of 1867. It is a familiar rule in the interpretation of written instruments

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and statutes that 'a passage shall be best interpreted by reference to that which precedes and follows it.' So also 'the meaning of a word, may be ascertained by reference to the meaning of words associated with it.' Applying these rules to this case we remark that in the section of the Law of 1867, which sets forth the classes of debts which are exempted from the operation of a discharge in bankruptcy, debts created by 'fraud' are associated directly with debts created by 'embezzlement.' Such association justifies, if it does not imperatively require, the conclusion that the fraud referred to in that section means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement, and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality.

"Such a construction of the statute is consonant with equity, and consistent with the object and intention of Congress in enacting a general law by which the honest citizen may be relieved from the burden of hopeless insolvency.

"A different construction would be inconsistent with the liberal spirit which pervades the entire bankrupt system."

Although the precise question of a factor's liability was not before the court, I think the principle of construction which was made the ground of the decision thus clearly expressed, is applicable to the case of a factor; and that this decision must be held to have overruled the cases in which a factor's liability was held not to be discharged in bankruptcy under the Act of 1867. No change was made in this respect, in the re-enactment of the Bankrupt Law in the Revised Statutes (Section 5117).

The petitioner is entitled to be discharged from arrest.

In re Ives et al.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

While an assignee is bound to pay a reasonable compensation for the use of premises occupied by him in winding up the estate, he does not, by accepting the trust, become the assignee of leases belonging to the bankrupt, or bound to pay the rent reserved.

To entitle the landlord to rent, the occupation of the assignee must be not merely technical, but substantial and beneficial to the estate.

In re IVES, GREEN & CO.

On petition of Eliza F. Brown for an order that the assignee pay the rent of a certain lot occupied by him.

The petition set forth that, at the commencement of the bankruptcy proceedings, the bankrupts were in possession of a certain lot on Atwater Street, under a lease expiring March 30, 1879, at a rental of eight hundred dollars per year; that at the time of filing of the creditors' petition, there was standing upon the lot a large smoke-stack and some boilers belonging to the bankrupt, and used by them in connection with their mill, which stood upon an adjoining lot, and until said smoke-stack and boilers were removed, it was impossible for the petitioner to have exclusive use of the premises, or to lease them; that such removal was not effected until about the 1st of October last, and that the petitioner had no notice of said removal for some time thereafter. Petitioner prayed that the assignee might be directed to pay for the premises, from the 22d day of March to the 22d day of September, at the rent reserved in the lease.

The answer admitted that the bankrupts had erected a smoke-stack, about six feet square at the base, and that the boilers were also placed on the lot in question, so as to occupy a strip of about twelve by forty feet on the westerly edge thereof, adjoining the mill upon the lot west of the premises in question; but that the mill had ceased to be used by the bankrupts at the time of the filing of the petition. The answer further averred that the lot was about seventy-five feet front

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One hundred and fifty feet deep, extending to the Detroit River; that it had no wharf in front, the water being shallow; that the lot had no valuable use except for storage, and that for such purposes it had been of no value since the commencement of the proceedings in bankruptcy; that there was no demand for unimproved lots in that vicinity, nor had they any rentable value; that petitioner had sustained no loss by the continuance on said premises of the smoke-stack and boilers, and that she had had no opportunity of renting the same. The assignee also averred that he had never accepted the lease, never received notice from the petitioner that he would be deemed to have accepted the same, by allowing the smoke-stack and boilers to remain; that the landlord never applied to this court to have them removed and the premises vacated.

It further appeared that soon after the appointment of the assignee, the agent of the petitioner stated to him that the petitioner ought to be allowed rent for the premises in question, while the smoke-stack and boilers remained there; that the agent asked the assignee whether he would let her have the smoke-stack and boilers for the rent, which he declined to do; that there was no serious proposition made on either side, until a short time before they were removed, when the assignee proposed to let the petitioner have the smoke-stack and the brick work about the boilers, if she would take them down, which proposition she declined to accept; whereupon the assignee removed them.

George S. Swift, for the petitioner.

Theodore Romeyn, for the assignee.

BROWN, J.—Doubtless an assignee in bankruptcy is bound to compensate a landlord for the use of premises occupied by him in winding up the estate. (*In re Hufnagle*, 12 N. B. R., 554, and cases cited; *In re Hamburger*, 12 N. B. R., 277; *Buckner v. Jewell*, 14 N. B. R., 286.)

He does not, however, by accepting the trust, become the assignee of leases belonging to the bankrupt, or become bound

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by any covenants contained therein. (*In re Washburn*, 11 N. B. R., 66; *In re The Lucius Hart Mfg. Co.*, 17 N. B. R., 459.) Although the rent be reserved in the lease, the assignee does not become liable to pay such rent by continuing to occupy the premises. The petitioner does not proceed upon the theory that the assignee accepted the lease, and thereby became obligated to pay the rent, but upon the theory that it was impossible for her to have exclusive use of the premises, so long as the smoke-stack and boiler remained there. But to make the assignee liable as a tenant, it must appear that his occupancy was not merely technical but substantial and beneficial. In this case, the chimney and boiler covered but a small part of the lot; by far the greater part being vacant. As the mill did not run, the assignee derived no benefit from permitting the chimney to stand there, and the petitioner lost nothing, for she was at liberty to rent the property at any time. While, technically, she could not occupy the entire lot, so long as the chimney stood there, there was no substantial occupation by the assignee, and there was no loss of any valuable right by the petitioner. (*In re McGrath*, 5 N. B. R., 254; *In re Washburn*, 11 N. B. R., 66; *In re Breck*, 12 N. B. R., 215; *In re Hamburger*, 12 N. B. R., 277; *In re Metz*, 6 Ben., 571; *In re Lynch*, 7 Ben., 26.) If the conversation between the assignee and her agent amounted to an agreement to pay the rent so long as the incumbrance remained upon the lot, it was an agreement to pay only what such occupation was reasonably worth, and as there is no evidence upon this point, and none to show that the assignee agreed to accept the lease, the petition must be dismissed.

Gates, Assignee, v. The Winooski Lumber Co.

UNITED STATES CIRCUIT COURT—VERMONT.

APRIL 2, 1878.

An arrangement was entered into between defendant and a committee appointed by the bankrupt corporation, defendant, and the other owners, by which defendant was to furnish the lumber necessary to rebuild a dam owned by them all. Defendant furnished a part of the lumber, placing it where it would be taken for use on his own land, but the dam was not rebuilt. Defendant proved his claim in the bankruptcy proceedings for the bankrupt's share of the purchase-price, but afterwards withdrew it, and neither the bankrupt nor its assignee ever paid anything for the lumber thus furnished or otherwise took possession of it. Subsequently, defendant obtained leave of the assignee to sell it, and promised thereupon to pay him his share of the avails; but after selling the same he refused, on demand made, to pay over plaintiff's share. In an action by the assignee to recover such share as money had and received to his use, *Held*, That it was proper to submit to the jury the question whether anything remained to be done to this lumber by defendant before, under the contract, it was to be taken and used; that the question whether the title to the lumber passed to the bankrupt, and therefore whether there was a consideration for defendant's promise, depended upon whether anything remained to be done by the seller.

JOEL H. GATES, Assignee, v. THE WINOOSKI LUMBER CO.

WHEELER, J.—This cause has been heard upon the motion of the defendant for a new trial, on account of alleged errors in matters of law at the former trial.

The action is upon the common counts in assumpsit for money had and received to the plaintiff's use.

It appeared from evidence not contradicted that the defendant, conceding that the plaintiff, defendant, and others owned a lot of lumber together, obtained leave of the plaintiff to sell it, and promised thereupon to pay him his share of the avails; that the defendant did sell it and receive the avails and refused, on demand made, to pay the plaintiff's share to him.

This evidence supported the declaration, and as it stood by itself the plaintiff was entitled to recover.

It appeared further, however, that the defendant formerly owned the lumber; that a committee chosen by a corporation now a bankrupt, of which the plaintiff is the assignee, the

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defendant, and the other owners bargained with the defendant for the necessary lumber to be furnished by the defendant for rebuilding a dam owned by them all; and that this lumber was brought by the defendant and put where it would be taken for use, which was on the defendant's land, ready for use, according to the bargain, but the whole was not furnished, nor was the dam rebuilt. In the bankruptcy proceedings the defendant proved a claim for the bankrupt's share of the price, and afterwards, with leave of court, withdrew it, and neither the bankrupt nor the plaintiff ever paid anything for it or otherwise took possession of it.

The defendant claimed that upon the evidence the lumber never became the property of the bankrupt, and requested that a verdict be directed for the defendant. The court submitted the case to the jury, with directions to find whether anything remained to be done by the defendant to this lumber before, according to the contract, it was to be taken and used, and if there was anything so remaining to be done, to return a verdict for the defendant, but if not, for the plaintiff. The only error complained of is in these rulings. It was doubtful whether, as the evidence stood, there should not be a verdict for the plaintiff without reference to any question about delivery, as the defendant recognized the plaintiff's ownership by obtaining leave to sell under it and agreeing to pay over the proceeds of the sale. But there was then no controversy about the plaintiff's right, and no yielding or compromise that could form a consideration for the undertaking to pay over the share of the avails, and it was thought that, if the plaintiff had no title, there would be no consideration for that promise, and it could not be enforced, and so the question of delivery was submitted to ascertain whether the bankrupt really had acquired a title that passed to the plaintiff. When the plaintiff had shown the undertaking upon a consideration apparently good and ample, it lay upon the defendant to avoid the transaction in some way or submit to a judgment, and the only attempt to do so was by showing the facts, and when shown they had no effect towards defeating the plaintiff's claim unless they showed a want of

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consideration. And it was not for the plaintiff to show there was a consideration any further than that the defendant sold the lumber and received the avails, but after that it rested on the defendant to show that in fact the lumber, and consequently the avails of it, were its own. If the lumber had been delivered under the bargain with the committee of the owners of the dam, then the share of the bankrupt became vested, otherwise not. Nothing was shown whether credit was to be given or not. If not, the defendant was not bound to deliver the property until it was paid for, and the title would not pass without consent of defendant without payment. But the defendant has not shown any standing upon that right by refusal to deliver without payment. On the other hand, the proof of the claim, although it was withdrawn, tended to show that express credit was given or that delivery without payment was assented to. Altogether there is a clear failure to show that the property was withheld for want of payment.

If the whole quantity bargained for had been brought there would seem to have been no question at all about delivery. It was taken by the defendant from the other property of the defendant and placed where it was wanted by the purchasers under a contract of sale.

But as part had been drawn, and part not, and it did not appear that the part drawn had been measured off at the time of the commencement of the bankruptcy proceedings, as of which time the plaintiff's title took effect, it was a little doubtful whether at that time there was not something remaining to be done about the property, by the seller.

That the question, whether the title did pass or not depends, under such circumstances, upon whether anything remained to be done by the seller, appears clearly from *Gibbs v. Benjamin* (45 Vt., 124), where the leading cases are ably brought together and reviewed, and that conclusion arrived at.

That is doubtless the effect of the common law everywhere, and its effect as affected by a statute of frauds like that of Vermont wherever the common law prevails and there is such a statute, but whether that is so or not, that is a late and

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authoritative enunciation of the law of Vermont by the highest court of the State, and, as this is a question of property under the laws of the State, that statement of the law should control.

So if there was any question at all to be submitted to the jury upon the evidence, it was the one that was submitted, and that having been found for the plaintiff, it ought to end the controversy.

Motion overruled and judgment on the verdict.

UNITED STATES DISTRICT COURT—E D. MISSOURI.

The bankrupt B. held certain shares of stock of the defendant, a National Bank. The bank claimed a lien on such stock, under its by-laws, to secure an indebtedness due it from the bankrupts. This by-law, the assignee claimed, was void under the National Banking Law, and upon refusal of the bank to give him, as assignee, a certificate for these shares, brought action for their value. *Held*, That as judgment for conversion vests the title to the converted property in the wrong-doer, and the wrong-doer in this case cannot hold the title, the assignee cannot maintain the action in this form.

The bank purchased a quantity of its stock on the market, and not having the right to hold it in its own name, divided it among some of the directors. The bankrupt B., who was one of the directors, took some of this stock and gave his note therefor, the bank retaining the certificate for him, although the stock was transferred to him on the books, and he received dividends thereon. On his failure the bank caused him to transfer the stock to its teller, but retained the note as an asset. In an action by the assignee to set aside the transfer as a preference, *Held*, That the bank had lawfully no stock to convey, and that B. was not the lawful owner.

*MEYERS, Assignee, etc., of GOODWIN, BEHR & CO.,
v. THE VALLEY NATIONAL BANK.*

PETER BEHR, of Goodwin, Behr & Co., had owned for some years ten shares of Valley National Bank stock, on which the bank claimed a lien, under its by-laws, to secure the large sum due it from Goodwin, Behr & Co. Mr. Meyers claimed that this by-law was void, as in contravention of the National Banking Law. The bank refused to give him, in his own name as assignee, a certificate for these ten shares, and he sued for their value. It also appeared that the bank had bought in a lot of

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its own stock on the market, and not having the right to carry it in its own name, arranged to parcel it among some of the directors. Behr, one of its directors, took twenty-five shares under this arrangement, and gave the bank his note for the amount, which was entered as a discount, the bank retaining the certificate for the sharer, although the stock was transferred to Behr on its books, and he received the dividends thereon. This note was given in 1876, and was several times renewed, Behr never being called on for payment. When he failed last September, the bank had him transfer the twenty-five shares to E. G. Moses, its teller, to secure itself. It kept Behr's note, however, and claimed it as an asset. The assignee claimed that this transfer was a preference. This was the second count in the petition.

TREAT, J.—At the trial of this case the first impression was that the defendant must be held estopped from disputing that Behr was the owner of the shares mentioned in the second cause of action. Further reflection upon an examination of the National Bank Act (Sections 5201 and 5210, with the cognate sections in the Revised Statutes) has induced a different conclusion. The bank was prohibited from becoming the purchaser or holder of the shares in dispute. How, then, could it acquire any title thereto which it could transfer to Behr? The irregular and unlawful contrivances adopted cannot change the legal results. The bank had lawfully no stock to convey, and though Behr may have appeared on the stock ledger as the owner of these shares, and the bank have paid him a cash dividend thereon, still he was not the lawful owner. A list of the stockholders, as required by Section 5210, and the report thereof to the Comptroller of the Currency, is necessary for the protection of all interests, especially with reference to the double liability. Hence, as to the second cause of action, the finding is for the defendant. As to the first cause of action—conversion of the ten shares—the parties consent to a judgment for the value thereof, five hundred and fifty dollars. But the court is here met by the legal difficulty that the bank can-

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not purchase or hold those shares. As judgment for conversion vests the title to the converted property in the wrong-doer, and the wrong-doer in this case cannot hold the title, how can the court give a judgment which will contravene the law? To carry out the agreement between the parties as to the said ten shares they should consent to an amendment of the petition, so that damages may be had for failure to transfer as demanded by plaintiff. The court can then assess nominal damages and costs, with the understanding that the transfer will be at once made to the plaintiff.

UNITED STATES DISTRICT COURT—S. D. ILLINOIS.

In composition proceedings, when objections are interposed by the minority whose claims will be discharged against their will, it is the duty of the court to examine those objections fully and carefully.

The court will not hesitate to interfere when the debtor has deceived the creditors into a vote which they would not have given had the facts been honestly and fairly before them; nor to withhold its assent to the composition, if it is satisfied that the proceedings are collusive, although there is only *one* dissenting creditor. But the court must act on evidence, not suspicion.

Where it appears that the creditors can receive no more than the amount proposed if ordinary administration be had, and there is no adequate proof of collusion, the composition should be confirmed.

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The facts sufficiently appear in the opinion.

TREAT, J.—Though suspicions are not proofs, yet, if apparently resting on good grounds, they should provoke careful scrutiny.

There is great difference of practice and rulings upon the Act of 1874, both as to involuntary and as to composition proceedings. Inasmuch as said act, unless the court proceeds thereunder with great circumspection, opens a wide door to fraud and collusion, this court has, in opposition to the views and practice of many other District Courts, insisted upon more

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than formal action. When involuntary proceedings have been instituted, it has always required, despite the admission of the debtor, that an examination should be had to ascertain whether the requisite number of creditors joined in the petition. It is unnecessary to repeat the reasons so often expressed for rigid adherence to that practice.

As to compositions, it should, in the absence of any objection, be supposed that the creditors know their own interest best; but when objections are interposed by the minority whose claims may be discharged against their will, it is the duty of the court to examine those objections fully and carefully. Rather than be annoyed with litigation and dilatory proceedings, or from other causes, charitable or sympathetic, some creditors readily give their assent to propositions made, without scrutiny or hesitation. If no other creditors were involved, courts might, without any interposition, permit them to decide for themselves what their own interests demand. But the act calls for the judgment of the court on the question, for the obvious reason that the minority need and are entitled to protection.

The first inquiry under the exceptions in this case pertains to the number, etc., of those voting for the resolution and attaching their confirmatory signatures. The register reports that the requisite number thus acted, even if the votes and signatures objected to were refused. Against that finding there is no satisfactory evidence. Whether it is for the best interests, etc., must depend upon the debts and assets. Two appraisements have been had whereby the visible assets have been ascertained. It is contended that the bankrupt's transactions for the past year indicate a larger amount of assets to be accounted for. It is certainly not very favorable to the bankrupt that his books have not been kept in such a manner as to show on their face the precise nature of each and every business transaction. About a year ago he effected a composition, mainly on terms requiring indorsed paper. One of the objects of the composition was that his assets should be retained by him, out of which he could realize enough to meet his composi-

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tion obligations. To secure his then creditors, he gave for time payments indorsed paper. Both his creditors and indorsers had a right to look to his then assets for their dues. The absorption of those assets in payments of the prior composition is not fully taken into account, nor the obligations of those indorsers. It may be that the Act of Congress is not sufficiently guarded in that respect. If the proposed composition is always to be in cash, how shall the bankrupt procure the means? The purpose is to learn the assets in his hands, out of which he may thereafter realize the means of paying what he proffers; and if he gives indorsers, the latter have a right to rely on said assets and his future gains. Were this not so the composition section would be futile.

In this case the bankrupt, when he effected a composition about a year ago at thirty per cent. of his indebtedness, did so on condition of giving indorsers for time payments, and having his property turned over to him free from debts. He thus started anew with assets valued at twenty-two thousand dollars (in round numbers).

As a large portion of the specific property then on hand was not sold at once, and as his purpose was to continue in business by adding thereto in the ordinary course of trade, each subsequent creditor could have readily ascertained (for it was of record) how much he owed under his former composition, and what assets he had at the time to meet the same. They also could have known that, inasmuch as his prior debts were discharged, what was the extent of his new obligations by indorsement. It cannot be held that those indorsers were limited to old assets for their obligations; that if the maker of the notes did not pay the same at maturity, and the indorsers were consequently compelled to do so, they had no subsisting demands against him; or, in other words, that they were to be classed solely as debtors whose dues were as existing prior to the composition.

It may be that a composition on payment by instalments, thus indorsed, leads to mischief in some cases; but if permissible, subsequent creditors are in no worse condition than when

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they sell or loan to a merchant without inquiring into the position of his affairs. Such indorsers are new creditors, and stand in the same condition as all other new or subsequent creditors, unless compositions, except for cash, are to be rejected. Counsel on both sides have given the court their aid to the fullest extent in analyzing the present condition of the bankrupt's estate. The conclusion reached by the court after patient investigation is that the assets of the bankrupt can in no contingency realize to the unsecured creditors a larger sum than the terms offered.

Ordinarily, that conclusion would be decisive of the case, for courts have nothing to do with the policy or impolicy of statutory law; but they must decide what the law is, leaving it to the law-making power to enact what statute the legislative wisdom may dictate. It would be aside from the province of the courts to enter upon a discussion foreign to their functions.

A question remains, concerning which decisions may not be in accord, viz.: To what extent the court will look behind the action of the creditors for the protection of their supposed interests, against their express will. This court has not hesitated to interfere when the *debtor* has deceived the creditors into a vote which they would probably not have given had the facts been honestly and fairly before them. It is charged in this case that the just inference from all the facts is, that the voting quorum is in collusion with the creditor, whereby the minority creditors will be compelled to take fifteen per cent. of their demands, while the others, under some secret understanding, are to receive, eventually, a larger percentage, or even payment in full. It is on this point that the court has had most embarrassment—not on the legal proposition—but on the facts disclosed. If the court were satisfied that the proceedings were collusive, or fraudulent in the sense suggested, it would not hesitate to withhold its assent to the proposed action, although there was only *one* dissenting creditor, for the Bankrupt Act, in all its features, looks to equality of payments. The fact that the bankrupt did, after his former com-

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positions, pay some of his creditors in full, to the extent of fourteen thousand dollars, must have tended to cripple his resources largely for future operation. Subsequent creditors had a right to suppose that his then present assets and business would be applied solely to his legal obligations; for if those assets were to be applied to obligations discharged by the former composition, then such composition for business ends was a snare and a fraud. True, if all subsequent obligations were amply provided for, then out of his surplus it might have been commendable to pay what, except for the Bankrupt Act, he would have been legally bound to pay. It seems that most of the creditors signing this composition, signed the former one, and subsequently received from the bankrupt payment in full, thus actually having had an advantage over others. Some of these creditors have been active in inducing others to sign the present composition. The evidence has failed to disclose that there is any positive understanding between them and the bankrupt that they shall hereafter fare better than other creditors, although the case wears a very suspicious aspect, especially when much evasive testimony is examined. On the other hand, some of the dissentients are creditors who sought to procure an advantage by attachments, which they must lose if the administration in bankruptcy is obtained, as it must now, whatever may be the result of the pending motion.

If the court could detect any direct or positive proof, or if it could infer within any recognized rules of evidence that there was collusion in the case, it would promptly reject the composition; but courts must act on evidence, not suspicion.

In determining what is for the best interests of creditors under composition proceedings, it is a source of great difficulty to measure the probabilities as to varied litigation. It may be that, if the ordinary course is pursued, the assignee might recover supposed preferences, the amount of which would swell the estate; yet all such disputes involve expensive litigation on doubtful questions, possibly at the expense of the creditors and all interested without increment to the estate. Hence, to save for the creditors the largest net amounts, courts have ad-

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justed demands in dispute, thereby avoiding litigation and its attendant expenses which not infrequently would have been largely more than the whole amount involved. Thus, if this case passes to the ordinary administration under assignment, it may be that many suits will have to be instituted concerning payments supposed to be improperly made, the outcome of which would be defeat or fruitless judgments. In view of such doubtful results creditors may have voted whereby they have preferred a small amount at once received to a possible receipt of a larger amount after doubtful and protracted litigation.

Suppose the debtor has so acted as to be subject to just censure, shall the creditors agree to receive all that it is possible for them to acquire, or refuse to do so in order to inflict upon him what they consider just punishment? It must be remembered that in the present aspect of the case the court is dealing with the creditors and their debtor solely with regard to pecuniary interests. What will be the outcome of an assignment and administration thereunder? Has there been collusion to the injury of any creditor?

It appearing that the creditors can receive no more than the amount proposed if ordinary administration is had, and there is no adequate proof of collusion, the exceptions will be overruled, and the composition ordered to be recorded, etc.

With a view to this investigation three appraisers were appointed at the instance of the dissenting creditors, also an expert. It was the fault of the bankrupt that such action was necessary, hence the costs thereof will be taxed as part of the costs of this case. The accounts presented are exorbitant. Certainly three appraisers could perform the work themselves, without the aid of outside parties. Hence the accounts of Matthews and Selkirk will be rejected. Each of the appraisers will be allowed one hundred dollars, and the expert one hundred and eighty dollars, to be taxed as costs.

In re Duncan et al.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

JUNE 8, 1878.

All objections to specifications should be raised by the exceptions first filed. Where the court has sustained the exceptions in certain respects, it must be deemed to have disallowed them in all other respects, and they cannot afterwards be renewed, unless the amendment allowed is, in effect, the making of a specification substantially different from the former one.

In re WILLIAM BUTLER DUNCAN, WILLIAM WATTS SHERMAN and FRANCIS H. GRAIN.

EXCEPTIONS to specifications filed in opposition to application for discharge.

F. N. Bangs, for bankrupts.

Field & Deyo and *Howard Payson Wilde*, for opposing creditors.

CHOATE, J.—Certain creditors having filed specifications in opposition to a discharge, the bankrupts excepted, and upon the hearing of the exceptions the first and second specifications were held to be indefinite and vague in a certain particular, and leave was given to amend in this particular.

The opposing creditors having filed amended specifications containing more definite allegations in the parts thus directed to be amended, and differing from the original specifications only in those parts, the bankrupts have filed exceptions to the amended specifications, renewing some of the objections contained in their former exceptions, and containing some further objections, the objections now made relating to other parts of the specifications.

The amendments are in accordance with the order of the court. As to all the other objections raised by the exceptions I think that they must be considered as already passed upon by the court, or as made too late.

All objections to specifications should be raised by the exceptions first filed. So far as the exceptions now taken are the same as were taken before, the case was heard, and the order

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having sustained the exceptions in certain respects, must be deemed to have disallowed them in all other respects. They cannot now be renewed.

If the amendment allowed is in effect the making of a specification substantially different from the former, the right to except thereto of course exists.

But that is not this case. If this practice were not adhered to there would be no end of dilatory proceedings, and it works no practical injustice.

The exceptions to the third specification were taken before, and must, therefore, be overruled.

Exceptions overruled. Case to stand for argument on the specifications, either party to have leave to take further testimony before the register upon notice. •

UNITED STATES DISTRICT COURT—OREGON.

JANUARY 12, 1878.

A bankrupt is not entitled to a wagon and team as exempt from the operation of the Bankrupt Act under Section 14 thereof, and Sec. 279, Sub. 3, of the Or. Civ. Code, unless he personally follows some trade, occupation, or profession, to the carrying on of which such wagon and team is necessary, nor unless he habitually earns his living by such trade, occupation or profession.

The *business* of mere buying and selling, or directing or employing the labor of others is not a *trade, occupation, or profession* within the statute; the statute was made for the benefit of those who live by their own labor, and require therefor the use of some of the articles enumerated therein.

An insolvent exchanged five hundred dollars worth of wheat for a wagon and team, with a view to claiming the latter as exempt from the operation of the Bankrupt Act. *Held*, that, under Sections 5129 and 5046 of the Act, the transaction was void, and the title to the wheat vested in the assignee. *Semble*, that the assignee may elect to take the wagon and team as the price or value of the wheat, and thereby affirm the exchange.

In re PARKER & MORRIS.

Exceptions to assignee's report setting apart exempt property. The facts appear in the opinion.

R. S. Strahan, for the bankrupt.

M. W. Fechheimer, for the assignee.

In re Parker et al.

DEADY, J.—On June 5, 1877, Allen Parker, of Albany, was adjudged a bankrupt upon his own petition filed upon the same day.

✓ The bankrupt excepts to the report of the assignee concerning property set apart under Section 14 of the Bankrupt Act, because there was not set apart to him a certain wagon, team and harness, belonging to the estate, of the value of five hundred dollars.

The bankrupt alleges that, at the date of the adjudication, "he was engaged in the business of farming, hauling, and storing grain, and general jobbing and hauling in Linn County, and that by said business he *habitually* earned his living; and that a wagon and team were and are *necessary* to enable him to carry on his said occupations;" that at the date aforesaid he "owned a wagon, team, and harness" of the value of five hundred dollars; and then and still uses the same in his business, by which he *habitually* earned and now earns his living, and that the same was and is necessary for that purpose. The assignee denies that the bankrupt at the date of the adjudication was engaged in any business other than that of a warehouseman as a member of the firm of Parker & Morris, and alleges that the bankrupt, a few days before filing his petition in bankruptcy, and with the intent to commit a fraud upon the Bankrupt Act, purchased said wagon and team with the design of claiming it as exempt under the Bankrupt Act.

From the evidence it satisfactorily appears that at the time of the adjudication the bankrupt owned a farm near Albany, and was also a partner in a wheat warehouse at that place. In the fall of 1876 he rented the farm, and from thenceforth until the filing of his petition in bankruptcy his only business was that of a warehouseman. In March, 1877, the bankrupt was aware of his insolvency, and contemplated going into bankruptcy unless an arrangement could be made with his creditors. About May 1st the bankrupt, under advice of counsel, purchased the property in question from his father-in-law, with wheat due him in the October following, for the

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express purpose and with the design of claiming the same as exempt from the operation of the Bankrupt Act.

It also appears that, after the purchase of the team, it was used more or less by the adult son of the bankrupt in teaming about Albany, he receiving his board from his father and allowing him two dollars per day of the proceeds, which were about three dollars, for the use of the same.

Under said Section 14 the assignee set apart to the bankrupt about three hundred dollars worth of property; and it is now claimed that this wagon and team are also exempt under the provision of said section, which excepts from the operation of the Act all property exempt from execution by the law of this State—namely, Sec. 279, Sub. 3, of the Or. Civ. Code, which, among other things, provides, that “the tools, implements, apparatus, *team, vehicle, harness* or library *necessary* to enable any person to carry on the trade, occupation, or profession by which such person *habitually* earns his living, to the value of four hundred dollars,” shall be exempt from execution.

In any view of the matter it is plain that all this property is not exempt from the operation of the Act, because it is of the value of five hundred dollars—one hundred dollars more than the law allows. But if the bankrupt is entitled to a team, harness and wagon of the value of four hundred dollars, and there is none belonging to his estate of only that value, I suppose so much of this as does not exceed that sum may be set apart to him. Upon these facts does it appear that the bankrupt, at or shortly before the filing of his petition in bankruptcy, was a person who *habitually* earned his living at an occupation which the possession of this team was *necessary* to enable him to follow or “carry on?” In an able argument, citing numerous authorities on the subject of exemptions, counsel for the bankrupt maintains that he was. But none of these cases arose under a statute like that of Oregon. Under this statute the person claiming the exemption must *habitually*—not occasionally, now and then, earn his living, not merely some of it—by some *trade, occupation, or profession*. The word *busi-*

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ness is not in the statute. In this respect it does not appear to have been made for the benefit of those who do not live by their own labor, and therefore do not require the use of the particular articles enumerated therein. The mere business of buying and selling, or directing or employing the labor of others, does not appear to be within its scope. The pursuit must be one which in some way involves the personal labor and skill of the debtor, and the article claimed as exempt must be something which is *necessary*—suitable and convenient, to say the least—to enable him to follow and carry it on.

In this case the debtor's occupation was that of a warehouseman. True he also owned a farm, but he was not engaged in farming since January 1, 1877; and it is quite doubtful whether he had followed the *occupation of a farmer* for the three years in which he had been engaged in the *business* of a warehouseman. Now, while a warehouseman may own and employ teams in hauling wheat to and from his warehouse or otherwise, it is not *necessary* for him to do so to enable him to carry on such business. The business of a warehouseman consists in receiving, storing, and delivering grain—not in teaming. A lawyer, doctor, or minister may own teams and employ them, but that fact does not of itself make either of them a teamster or a person who *habitually* earns his living as a teamster and by means of a team. Nor do I think the *business* of a warehouseman is a "trade, occupation, or profession" within the meaning of the statute so as to entitle a person engaged in it to claim any tools, implements, or other things as exempt from execution. His warehouse and grounds are the things used in carrying on his business, and they are not within the category of property which may be claimed as exempt.

The bankrupt simply owned this team and hired it to his adult son, who gave a certain share of his earnings with it for the use of it. He did not thereby become a teamster, although the profits derived from such ownership and employment may have been applied to the support of his family. And if upon the evidence it should be concluded that the bankrupt, instead of hiring this team to his son, hired the son to drive the team,

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the difference would not change the legal effect of the transaction. Still the bankrupt would not be a teamster or habitually earn his living by the use of a team.

In *Brusie v. Griffith* (34 Cal. 302), a case in its leading features like this, and arising under a statute very similar to that of Oregon, it was held that—"In the sense of the statute, one is a teamster who is engaged, with his own team or teams, in the business of teaming—that is to say, in the business of hauling freight for other parties for a consideration, by which he habitually supports himself and family, if he has one. While he need not, perhaps, drive his team in person, yet he must be personally engaged in the business of teaming habitually, and for the purpose of making a living by that business. If a carpenter or other mechanic who occupies his time in labor at his trade, purchases a team or teams and also carries on the *business* of teaming by the employment of others, he does not thereby become a teamster in the sense of the statute. So of the miner, farmer, doctor, and minister."

*Shady son
much. Sh. 36
Cure Cure*

I do not think the bankrupt is entitled to the exemption under the statute.

It is also claimed by the assignee that the purchase of this property under the circumstances was a fraud upon the Bankrupt Act (Sec. 5129 R. S.), and therefore void; citing *In re Wright* (8 N. B. R., 430); *In re Boothroyd* (14 Id., 223); *In re Lammer* (Id., 460).

There is no doubt but that the *transaction* comes within the prohibition contained in said section. At the time of the purchase the bankrupt was insolvent, and it was made with a view of preventing the wheat exchanged for the team from coming to his assignee *and* to prevent the same from being distributed under the Bankrupt Act. By exchanging the former for the latter, which he hoped to retain as exempt from the operation of the Act, he intended and expected to prevent five hundred dollars of his property from coming to his assignee in bankruptcy, and thereby deprive his creditors of that amount to his own gain. But the transaction being void, because contrary to Section 5129 aforesaid, it would follow that

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no title or interest passed by it, and therefore the *wheat* remained the property of the bankrupt and passed to his assignee, as provided in Sec. 54046 of the R. S., which declares that "All property conveyed by the bankrupt in fraud of his creditors" shall vest in the assignee. And it may be that the assignee may affirm the exchange by electing to take the property received by the bankrupt in exchange for the wheat as the price or value thereof.

The exception to the action and report of the assignee is overruled.

UNITED STATES DISTRICT COURT—E. D. TEXAS.

The 17th Section of the Bankrupt Act, passed June 22, 1874, Section 5103a of the Revised Statutes, providing for the settlement of estates in bankruptcy by composition proceedings, does not, in providing a remedy, operate to repeal the general provisions of the Bankrupt law; the section is rather to be construed in harmony with the general principle pervading all bankrupt laws.

The authority of a Bankrupt Court upon the submission of a resolution in composition proceedings, duly accepted and confirmed by the requisite number of creditors under the provisions of said Section, is not limited to the determination of a mathematical result.

In the absence of fraud, accident, or mistake, the determination of the creditors is final as to the quantum of composition; but when through preferences, fraudulent under the Bankrupt Act, injustice has clearly been done to the body of creditors, the ancient maxim must apply, "The law would rather tolerate a private loss than a public evil," and the court will not lend its aid to the relief and discharge of the debtor, and create a precedent for the doing of that which bankrupt laws were devised to prevent.

In re B. H. JACOBS.

On the twenty-sixth day of February, 1878, a petition in bankruptcy was filed by Messrs. Dalsheimer Bros., of Camden, New Jersey, and other creditors, against said debtor. On the same day the debtor filed a waiver of service of process and copy of petition, and admitted that the petitioning creditors constituted the requisite one-fourth in number and one-third in

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value of all his creditors, and on the 2d of March following a petition was filed for a general meeting of his creditors, to consider a composition of thirty per cent. proposed by him; accordingly such meeting was held before the register on the twenty-sixth day of March, 1878, and continued by adjournment to the second day of April, 1878, when, after examination into the debtor's affairs, and after there had been submitted to the meeting by Messrs. Mann & Baker, counsel for John Mahon & Sons, opposing creditors, a statement, admitted by the debtor to be correct, showing certain preferences to home creditors, a resolution to accept the proposed composition was passed, accepted, and confirmed by the requisite number of all the creditors, which proceedings were duly certified and reported to the court by Arthur W. Andrew, Register presiding, without an expressed opinion as to whether the composition should or should not be confirmed.

Upon hearing, the debtor was adjudged bankrupt, but a rehearing being granted, the court re-referred the matter to the register, with instructions to examine the debtor's books of account to determine their correctness, also to take the testimony of witnesses if deemed necessary, and to report to the court after such investigation whether, in the opinion of the register, "said composition should or should not be confirmed."

In compliance with this order, the register again reported to the court on the eighteenth day of May, 1878, attaching to his report the depositions of certain witnesses, one of whom was a preferred creditor, and a statement of facts elicited from these examinations. These briefly were:

That said B. H. Jacobs, being a clerk and salesman in the house of A. Kory & Bro., a firm composed of A. and M. Kory, his brothers-in-law, dealers in boots and shoes on Market Street, in the city of Galveston, on the fifteenth day of May, 1875, bought out his employers' interest for fourteen thousand eight hundred and fifty-six dollars and twenty cents, paying five thousand dollars cash, his entire capital, and executing severally to A. and M. Kory his notes for the balance in amounts pro-

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portioned to his vendors' respective partnership interests in the stock purchased.

That as their successor he continued the business till the date of bankruptcy proceedings, during which time Mr. M. Kory acted as his salesman. His purchases during the period, excluding original stock, were sixty-eight thousand five hundred and twenty-four dollars and fifty-five cents, and entire sales about seventy-three thousand four hundred dollars.

His profits, as estimated by him, were twelve per cent. upon sales. By the entries upon the "cash" however, his private expense account stands charged with a larger sum than the aggregate of such profit.

From the 15th of May, 1875, to the day his commercial paper went to protest, January 4, 1878, it appears that at no time was he in condition to pay his original purchase-money notes and continue his business without sacrificing his principal stock. Added to this he was compelled to pay a surety debt during the year 1877, amounting to two thousand six hundred and fifty dollars.

He renewed the notes given to A. Kory & Bro. for his original purchase after maturity, "being unable to pay them when due." Those due A. Kory were renewed August 1, 1877; nevertheless, during the succeeding autumn months, he purchased goods to the amount of twenty-four thousand six hundred dollars, of northern creditors, and "as he made sales" cancelled the indebtedness due to creditors who were members of his family. Of these obligations he paid six thousand seven hundred and sixty dollars in the months of November and December, 1877, alone.

The relationship existing between himself and the late firm of A. Kory & Bro., as shown by the testimony adduced, is conclusive that they were fully advised of his insolvent condition. The deposition of M. Kory, who was his salesman, brother-in-law, and a member of his family, is sufficiently explicit on this question.

The "cash" shows the following payments in the latter part of December, 1877:

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Dec. 18th, To Max Kory,.....	\$676 45
“ 23d, “ “ “	250 00
“ 26th, “ “ “ \	250 00
“ 28th, “ Adeline Levy,	650 00
“ 28th, “ A. Kory,	700 00

On the 4th of January following, his commercial paper in the hands of A. E. & H. Bacheller, of Boston, went to protest, and sixty days after the last payment made to A. Kory a petition for adjudication of bankruptcy was filed against him, followed by his petition for a general meeting of his creditors to consider his proposed composition.

OPINION OF THE REGISTER.

I desire most respectfully to submit the following as my opinion of the law applicable to the foregoing state of facts, and as to what decision the court is called upon to render upon a submission of the whole case as directed.

The power of this court as a Court of Bankruptcy was invoked by the petitioning creditors, under the provisions of Sec. 5021 of the Revised Statutes, defining what are acts of bankruptcy. The special averment relied upon by the petitioners is stoppage of payment of commercial paper, made and passed by the debtor in the course of his business as a tradesman, or retail dealer, and failure to resume payment for a period of forty days.

Under these averments the debtor was by the court adjudged bankrupt on the sixth day of May, A.D. 1878.

Under a further provision of Sec. 5021, any payment made by a debtor, he being bankrupt or insolvent or in contemplation of bankruptcy, with intent to delay or defeat the operation of the Bankrupt Act, is a sufficient ground for adjudging a debtor bankrupt, and, if fraudulently made, of preventing his discharge under the fifth clause of Sec. 5110 of the Revised Statutes.

Fraud under the Bankrupt Act has been clearly defined.

“ The Act was designed to secure an equal distribution of

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the property among the creditors, and any transfer made with a view to secure the property or any part of it to one, and thus prevent such equal distribution, is a transfer in fraud of the Act." (*Martin v. Toof*, 4 N. B. R., 488; 1 Dillon, 203; *Toof v. Martin*, 6 N. B. R., 49; 13 Wall., 40; *In re Kingsbury et al.*, 3 N. B. R., 318.) "When a creditor has shown his inability to meet his engagements, one creditor cannot by collusion with him obtain a preference to the injury of others." (*Beattie v. Gardner*, 4 N. B. R., 323; *Smith v. Buchanan*, 8 Blatch., 153; *Buchanan v. Smith*, 16 Wall., 277; *Sage v. Wynkoop*, 16 N. B. R., 363.)

The foregoing statement of facts is conclusive that certain preferences were made to creditors whose relationship to the business and family of the debtor advised them fully of the insolvency of the debtor, and this fact is admitted by one of them.

They held his commercial paper which was not paid at maturity.

"Insolvency means an inability to pay debts as they mature and become due and payable." (*Hardy v. Clark*, 3 N. B. R., 385; 17 Pitts L. J., 61.) "The term insolvency imports a present inability to pay." (*In re Oregon B. Printing Co.*, 13 N. B. R., 503.)

They had sold him his original stock in trade; one of them was his salesman, and the other conducted business in the same, or in an adjacent building.

Within the sixty days preceding the protest of his commercial paper, and within the four months next preceding the commencement of bankruptcy proceedings, his cash account, admitted to be correct by him, shows payments to A. & M. Kory to the amount of four thousand eight hundred and ten dollars and ten cents, beside other payments to non-resident members of his family, in aggregate six thousand seven hundred and sixty dollars and ten cents.

"Every person of a sound mind is presumed to intend the necessary, natural, or legal consequence of his deliberate act." (*In re Smith*, 3 N. B. R., 377.)

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“When the probable consequence of an act is to give a preference, the debtor will be conclusively presumed to have intended to give such preference.” (*In re Drummond*, 1 N. B. R., 231; *Sampson v. Burton*, 4 N. B. R., 1; *Traders' Nat'l. Bank v. Campbell*, 6 N. B. R., 353; 14 Wall., 87; *Cumppbell v. Traders' Nat'l. Bank*, 3 N. B. R., 498; 2 Biss., 423.)

The last payments made to his home and family creditors, were made on the twenty-eighth day of December, 1877. One of them was made to A. Kory; the seventh day thereafter his commercial paper, held by a northern creditor, went to protest. To make a preference absolutely void under Section 5130, the same must have been made within two months of the date of the filing the petition for adjudication against him. Sixty days thereafter, or on or about the date of the expiration of this limitation of time, bankrupt proceedings are commenced, the debtor accepting service of petition, and waiving copy of order to show cause. Secured by this supposed statutory ægis, the debtor invokes the power of the Court of the United States, sitting as a Court of Bankruptcy, to coerce such minority of his creditors as may object to the acceptance of such proposition in composition as may be proposed by him, and offers one of the preferred creditors as indorser for his deferred payments therein.

“The principle of the bankrupt laws being the equal distribution of the property and effects of a bankrupt among his creditors, acts which are done with the object of preventing an equal distribution of the property and effects of a bankrupt among his creditors, are fraudulent within the meaning of those laws.”—(Kerr on Fraud and Mistake, 280.)

It is contended by those in favor of enforcing the terms of the composition offered and accepted by the requisite number of creditors in these proceedings, that whatever violations of the principle or letter of the law may be brought to the notice of the court, “it is powerless unless it shall appear that the interest of the creditors will not be promoted by the terms of composition.” (*In re Allen*, 17 N. B. R., 157.)

Such construction carries us to this result: That the court

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must consider that the 17th Section of the Bankrupt Act as amended, operates to supersede or repeal, at least in part, the very section of the Revised Statutes through which the court obtained jurisdiction of the subject matter, to wit, Section 5011.

“Reason is the soul of the law,” (4 Coke, 48); “and the ancient maxim ought rather to obtain, ‘*Lex citius tolerare vult privatum damnum quam publicum malum.*’” It is better that a present personal loss should be sustained than that the court should create a precedent that would operate to give full authority to all debtors to do that which bankrupt laws were especially devised to prevent.

But it appears to me the whole law may be construed harmoniously.

“It is an established rule in the exposition of statutes, that the intention of the lawgiver is to be deduced from a view of the whole and every part of the statute taken and compared together. . . . *Scire leges non hoc est verba earum tenere, sed vim ac potestatem*, and the reason and intention of the law will control the strict letter of the law when the latter would lead to palpable injustice, contradiction, and absurdity. (1 Kent, 462; *Cannon v. Vaughan*, 12 Tex., 399.)

The legislative intent in framing the 17th Section of the Bankrupt Act as passed June 22, 1874, as stated by Justice Miller, “was to mitigate in favor of the debtor the rigor of the Act of 1867.” (*In re Scott Collins & Co.*, 15 N. B. R., 73, 4 C. L. J., 29.)

It is derived from the British Act of 1868, but contains this clause not found in the English law, “Every such composition shall, subject to priorities declared in said Act, provide for a *pro rata* payment or satisfaction in money to the creditors of such debtor.”

It therefore appears that the leading principle upon which all bankrupt acts are founded is especially recognized.

This section also provides that upon hearing the court shall determine whether the accepted composition is for the best interest of all concerned, and also that the court may set aside the composition if it cannot proceed without injustice to creditors.”

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It is urged in particular that the requisite number of creditors having by their signatures confirmed a resolution to accept a composition, the court has no discretion under the statute whatever fraudulent preferences may have been brought to the notice of the court, but must recognize the act of such creditors as determining the best interest of all concerned. That in fact the court sits at a hearing in composition chiefly to determine a mathematical result; given the aggregate of the debtor's liabilities, and the entire number of his creditors, has a sufficient body of his creditors, in number and amount, accepted his terms? Such has not heretofore been the ruling of this court. (*In re A. S. Fox*; *In re Jos. Cramer & Co.* not reported.)

It would seem a better construction of the composition act to consider it a part and parcel of the bankrupt law, and that the debtor who would profit by its privileges must be subject to its general provisions, and that the discretion accorded to the court in this matter is the discretion accorded to a Court of Equity. "Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence." (Story's Equity Jur., 1520.)

In the absence of fraud the determination of the creditors is, under the English decisions, final as to the quantum of composition.

"The only exception we would recognize," says Judge Emmons, is "where it manifestly appears there was some fraud, accident, or mistake such a contingency as would incline the court, *ex mero motu*, to refuse to proceed." (*In re Weber Furniture Co.*, 13 N. B. R., 559).

Being therefore of the opinion that the payments made to A. and M. Kory during the months of November and December, 1877, were made out of the proceeds of goods for the most part recently purchased and unpaid for, and were made in contemplation of bankruptcy, and that the persons so preferred received the same knowing the insolvency of the debtor, and that such payments were made in fraud of the Bankrupt Act; notwithstanding the same were made sixty days prior to the filing the petition for adjudication of bankruptcy against said

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debtor, in my opinion no proposal in composition ought to receive the approval of the court unless the *pro rata* offered to all the creditors should be equal to such amount as they otherwise would be entitled to receive if no such preference had been made, taking the present estimated assets of the bankrupt and the thirty per cent. now offered in composition as the basis of such calculation, following in principle the decisions heretofore rendered by the Honorable the Judge of this Court. (*In re Jos. Cramer & Co., In re A. S. Fox, supra.*)

I am therefore of the opinion that the composition of thirty per cent. proposed by the bankrupt should not be confirmed.

All of which is most respectfully submitted.

ARTHUR W. ANDREWS, *Register.*

MORRILL, J.—I concur in the opinion and conclusion of the register, and order accordingly.

UNITED STATES DISTRICT COURT—N. D. MISSISSIPPI

We assigned his property for the benefit of all his creditors. A few days afterward judgments were entered and enrolled against him. The enrollment, by law of this State, gave liens on the property of W. He filed a petition in voluntary bankruptcy within sixty days from the date of the assignment.

Held, That the assignment was not void at common law; was only void under the Bankrupt Law as against the assignee, and that the property was not W.'s, but that of the trustee, and no lien existed in favor of the judgment-creditors.

Held further, That neither of the following facts rendered the deed of assignment void, viz. :

- 1st. That it was made to a trustee who was the clerk of W. ;
- 2d. That it was made to a trustee of little or no property, but of excellent character, without requiring bond ;
- 3d. That it required a sale of the goods for cash, but permitted a sale on a credit of not exceeding thirty days, if the trustee deemed this best ; and
- 4th. A subsequent proposition of W. to pay a certain amount to his creditors, coupled with a threat of bankruptcy, did not of itself vitiate the deed.

The trustee was subsequently chosen assignee in bankruptcy. *Held*, That upon the execution of the assignment to him by the register the title became vested in him from the date of the assignment, and this being so, all his

In re Walker.

acts as trustee, performed in accordance with the deed of assignment, intermediate its date and bankruptcy, must be approved.

In re JOHN C. WALKER.

THE facts fully appear in the opinion.

Manning, Watson & Moore, and Fant & Fant, for creditors.

Walter & Walter, for assignee.

HILL, J.—The questions now for decision arise upon the petition of a number of judgment-creditors of said bankrupt, claiming liens upon the bankrupt estate, the answer of J. G. Chism, the assignee, and proof; from which the following facts appear: Walker had been for many years a merchant in Holly Springs; two judgments had been recovered against him, which created liens upon his property; other suits had been brought against him not ripened into judgments. Finding himself unable to meet his liabilities, and being thus pressed, on the twentieth day of February last, he executed to said Chism, who had for a number of years been his clerk and well acquainted with his business, a deed conveying to him all his property and assets, except his exempt property, directing that the trustee should proceed to sell the stock of goods at private sale for cash, or, if he thought best, on thirty days' time, and first pay off these judgment liens, and then make a pro rata division among all his creditors; at the expiration of five months the remnant then on hand to be sold at auction for cash. This deed was on the 4th of March acknowledged and recorded as required by law. Soon after this conveyance was made, Walker wrote to all his creditors, giving them a statement of his assets and liabilities, and proposing to compromise with them upon certain terms mentioned, and stating that he had made an assignment of all his property and assets for the benefit of all his creditors, and that if his creditors did not accept his proposition and give him a release, he would avail himself of the benefit of the Bankrupt Law. Whether any of the creditors accepted this proposition does not appear, but the

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petitioners did not, but pressed their claims into judgments, and had them enrolled prior to the twentieth day of April, when Walker filed his petition in this court, upon which he has been declared a bankrupt, and at a meeting of the creditors for the purpose said Chism was appointed his assignee and a deed of assignment of the bankrupt's estate executed to him as required by law. Chism, since the assignment made to him by Walker, has been in possession of the assigned property, and has proceeded to sell the goods, collect the debts due, and to pay off the judgments against the bankrupt recovered before the assignment, as directed by it. In his answer, Chism proposes to surrender all his rights under the assignment and to treat the assets as belonging to the bankruptcy, and asks that his acts as trustee be approved, alleging that they were all consistent with the bankruptcy, and not antagonistic to it. Upon the other side, the petitioners pray that the deed of assignment to Chism by Walker be declared void, that their judgments be declared liens upon the property of the bankrupt and paid out of the proceeds of the sales thereof.

The principal question to be determined is as to the validity of the conveyance by Walker to Chism as against creditors, for if that conveyance was valid no lien attached before the bankruptcy, and none now exists.

It is contended by petitioner's counsel that the deed is void upon its face, first, because it was made to Chism, the clerk of the grantor, and that he is shown by the proof to be a man of little or no means. Chism is admitted to be a good business man, of unimpeachable integrity and moral character. His being the former clerk of the bankrupt, and familiar with the business, is in my opinion a strong reason why he should have been selected; being a man of unquestioned integrity more than supplies the want of an estate. This is the class of men usually selected for important trusts by the most prudent business men—not being encumbered with business of their own, they can give their entire attention to the trusts committed to them. I have never known security exacted of a trustee by a voluntary grantor. I do not think such a trustee is the one

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condemned by the authority to which I am referred by the petitioners' counsel, and therefore must hold this objection not well taken.

The next objection is that it authorized a sale upon credit. Had the credit been a long one, or had it been left entirely to the discretion of the trustee, as in the cases referred to by petitioners' counsel, the objection would have been good, but it was limited to thirty days, which is among business men considered as a cash sale, the time given being a mere convenience, and no additional charge made for the delay, and is usually a matter of convenience among merchants in dealings between themselves as such, and seldom ever extended to any but those who are expected to pay on the day when due. I am satisfied this objection is not maintainable.

Another objection is, that it reserved the exempt property without specifying what it was. That the grantor had a right to reserve his exemptions is admitted, but it is said it left to him the right to determine what they were. This is a mistake. The deed only reserves them, the law designates them. I do not think this objection well taken.

These are all the objections made on the face of the deed itself, as evidence of fraud, but it is insisted that soon after the execution of the deed, Walker wrote to his creditors, proposing an unreasonable compromise, upon condition of a release from his debts, coupled with the threat that if his proposition was not accepted he would go into bankruptcy, and that such was his purpose in making the assignment.

Had the deed contained a provision that only such creditors as should release their debts should be entitled to its benefits, the condition would have avoided the deed as to all who did not accept its conditions; but no such conditions are contained in the deed. Walker had a right to make a proposition to his creditors, and if he made a truthful statement in relation to his means and liabilities, and left them to judge of the propriety of its acceptance, the creditors cannot complain that, upon their declining to accept, he would avail himself of a right given by law, so that this objection is not maintainable.

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The numerous authorities read by petitioners' counsel I do not think apply to the facts in this case, and am satisfied that, aside from the Bankrupt Law, there is nothing shown to invalidate this assignment, and there is nothing in the assignment contrary to the spirit and purpose of the Bankrupt Law, further than it attempts to substitute a different machinery from that provided by law for carrying out the purpose of the law, namely, an equal distribution of the assets among the creditors. Whether such a conveyance is valid or invalid, under the provisions of the Bankrupt Law, under recent decisions, is not well settled. The weight of authority is against its validity, but only for the reason stated, and at most only renders the conveyance voidable upon the application of the assignee; and being valid until otherwise declared by the proper court, no time elapsed in which the judgment of petitioners fixed themselves as liens upon the property of the defendant in the judgments, prior to the bankruptcy.

To hold otherwise would make the action of the assignee defeat the very purpose of the application. The effect of setting aside the conveyance, as against the assignee only, has no other effect than to avoid any attempted incumbrances or disposition of the property inconsistent with the assignment, between the time it was made and the bankruptcy. This court so decided in *Mitchell v. Hayes* some years since, upon this reason alone, as well as I now remember; but since then I find myself sustained by *Johnson v. Rogers* (15 N. B. R., 1; 14 A. L. J., 427); *Everett v. Stone* (3 Story, 446); and *Dodge v. Sheldon* (6 Hill., 9).

The above position is sustained by a very able opinion of Judge Johnson, in the Circuit Court of the United States for the Northern District of New York, in the case of *In re Biesenthal* (15 N. B. R., 228). In this case it is held that where an assignment for the benefit of creditors is set aside, at the suit of the assignee in bankruptcy, judgment-creditors who have levied upon the property, after the assignment and before the commencement of the proceedings in bankruptcy, have no priority over the assignee; "that, while in general the title of

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the assignee relates back only to the commencement of the proceedings in bankruptcy, yet where transfers are void as to *him*, his title relates back to the time of such transfer."

The same doctrine was held by Judge Wallace, in the case of *Johnson, assignee, v. Rogers* (15 N. B. R., 1). The only adverse ruling with which I have met is the case of *Macdonald v. Moore* (15 N. B. R., 26). See also *Mayer v. Hellman* (13 N. B. R., 440, 1 Otto, 496).

I am satisfied that the petitioners obtained no lien upon the property of the bankrupt by reason of the invalidity of the assignment as to them, and that, for the sole reason that the voluntary assignment deprived the creditors of the selection of the assignee and the aid of the court to collect and distribute the assets, the conveyance must be declared void as to the assignee in his character as such, and that upon the execution of the deed of assignment to him by the register the title became vested in him from the date of the assignment, and that such being the case all his acts as trustee which would have been valid, had he then been acting in his capacity as assignee, must be approved.

The alleged transfers of notes to Mr. and Mrs. Thompson are shown to have been made months before the assignment to Chism, and before such conveyance was contemplated. Besides, they are shown to have been made for present considerations, and not to secure antecedent debts, so that they can have no avail in aid of the prayer of petitioners. The result is that a decree must be entered, denying the relief prayed for in the petition, but declaring the conveyance void only as against the title of Chism in his capacity as assignee in bankruptcy, and that his title to the property and assets conveyed in the deed relates back to the execution of the deed, and that all the acts of Chism after he received the property and assets transferred to him, not inconsistent with his title and duty as assignee in bankruptcy, be approved and ratified.

The result of these proceedings being necessary for a proper administration of the estate, the costs will be paid by the assignee.

In re Baxter et al.

UNITED STATES DISTRICT COURT.—S. D. NEW YORK.

JUNE 7, 1878.

The bankrupts were the general business agents of a corporation, and as such were authorized to receive and disburse all the moneys of the corporation "except subscriptions to its capital stock." B., one of the bankrupts, who was treasurer of the corporation, received subscriptions to the capital stock, which he paid into the business of his firm. It did not appear that any stockholder or director of the corporation except B. and his partner had any knowledge of the misappropriation of the funds. *Held*, That B. was liable personally therefor; that the firm, having taken the funds with knowledge that it was not entitled to receive the same, was equally liable, and that proof could be made against both estates.

The bankrupts, as such agents, consigned goods of the corporation for sale to an English firm, of which B. was a member. Prior to the receipt of the goods, said firm had accepted and paid drafts of the bankrupts to an amount exceeding the value of all their consignments, and on that account claim that they have accounted with the bankrupts and paid over the proceeds of the goods to them. *Held*, That this was not a payment which would discharge said firm from liability, and that the claim for such proceeds being for a partnership liability of B., ranks in the distribution of his individual estate after his individual debts.

*In re ARCHIBALD BAXTER and DUNCAN C.
RALSTON.*

THE facts sufficiently appear in the opinion.

W. H. Arnoux & Mr. Macrea, for receiver.

W. A. Abbott, for assignee.

CHOATE, J.—Re-examination of claims under stipulation. One of the bankrupts, Archibald Baxter, was treasurer of a corporation, The International Packing Co.

His firm, Archibald Baxter & Co., were the general business agents of the corporation, under an appointment by written resolution, authorizing them to receive and disburse all the moneys of the corporation "except subscriptions to its capital stock."

Archibald Baxter, as treasurer, received subscriptions to the capital stock to the amount of one hundred and fifteen thousand four hundred dollars, which, notwithstanding this prohibition, he paid into the business of his firm.

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It needs no argument to show that he is personally liable to the corporation therefor, unless the corporation has acquiesced in and consented to the disposition which he made of the money.

There is an entire failure to prove such acquiescence.

It is true that the fact was known to Baxter and his partner Ralston, who were both directors and officers of the corporation, and there were entries on the books of the corporation, which were kept by Baxter & Co., which might have led others to a discovery of the fact, but no proof is given that any other director or stockholder had any knowledge of the misappropriation of the funds.

The firm of Archibald Baxter & Co., having taken the funds with knowledge that they were not entitled to receive the same, are equally liable to the corporation with Baxter personally, and, on the authority of *Emery v. Canal Nat. Bank* (7 N. B. R., 217), I think proof can be made against both estates.

The goods of the corporation were consigned for sale by their agents, Archibald Baxter & Co., to Baxter, Steedman & Co., an English firm, of which Archibald Baxter is a member, and a claim is made against the separate estate of Archibald Baxter for the amount of these consignments. Baxter, Steedman & Co. received the goods with notice that they belonged to the corporation. Undoubtedly, so long as the proceeds remained in their hands, they would be liable directly to the corporation therefor.

It is claimed, however, that they have accounted with Archibald Baxter & Co. therefor, and paid over the proceeds of the goods to them. This would discharge Baxter, Steedman & Co. from liability to the corporation, as Archibald Baxter & Co. were its agents to receive the same. The only way, however, in which they have so paid over the proceeds is by the acceptance and payment, prior to the receipt of the goods, of the drafts of Archibald Baxter & Co. to an amount exceeding the value of all their consignments.

This is not a payment which discharges Baxter, Steedman & Co. from liability.

The transaction was, in substance and effect, not a payment

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to Archibald Baxter & Co. of the proceeds of the goods, but the application by Baxter, Steedman & Co. of the proceeds of the goods of the corporation to the payment of a debt due to them from Archibald Baxter & Co.

The receiver of the corporation has, in making proof of this claim, set it forth in his deposition as a claim for goods sold by the corporation to Baxter, Steedman & Co. He was evidently misled by the entries in the books. He should make new proof of the debt, setting it forth according to the fact. This claim being for a partnership liability of Archibald Baxter, will of course rank in the distribution of his individual estate after his individual debts.

UNITED STATES DISTRICT COURT—S. D. ILLINOIS.

JUNE 17, 1878.

On the 11th of January, 1878, the bankrupt, a druggist, executed a chattel mortgage on all his stock of drugs, etc., constituting his stock in trade, to his father-in-law, to secure him as surety on a note given by the bankrupt. The mortgage was taken with the understanding that the bankrupt was to go on and sell at retail in the ordinary way, which he accordingly did. On the 20th of May the mortgagee, having become dissatisfied with the way in which the business was being conducted, took possession of the property under the mortgage. On the 4th of June the petition in this case was filed. *Held*, That the mortgage and the seizure of the property thereunder were both acts of bankruptcy, the first as being a fraudulent conveyance, and the second as operating as an unlawful preference.

In re WILLIAM A. FOSTER.

THE facts fully appear in the opinion of the register.

OPINION OF REGISTER.

TO HONORABLE SAMUEL H. TREAT, Judge of said court:

The petition of Richardson & Co. and Clarke M. Smith, creditors of William A. Foster, praying for the adjudication of said debtor as a bankrupt, which was filed on the 4th of June,

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1878, and the answer of said debtor denying the alleged acts of bankruptcy, and the testimony heretofore taken in this matter, having been referred by order of the court to the undersigned register, to consider the same and make report of his conclusions thereon, I would respectfully report that, after examining the evidence in this matter and hearing the arguments of Honorable J. W. Patton, attorney for the petitioning creditors, and Honorable A. L. Knapp, attorney for the debtor, I have arrived at the following conclusions:

The debtor is a retail druggist, doing business at Springfield. On the 11th of January, 1878, he executed a chattel mortgage to his father-in-law, Isaac L. Ewell, to indemnify said Ewell as surety for Foster on his note to H. B. Buck, for two thousand dollars, of even date with the mortgage, and payable eighteen months after date. This two thousand dollar note was partially in renewal of a former note to Buck, signed by Ewell, as surety for Foster, for one thousand two hundred dollars, which was taken up on the execution of the new note.

The mortgage was acknowledged and recorded on the 14th of January last. By this mortgage Foster conveyed to Ewell, among other things, all the stock of drugs, chemicals, medicines, wines, etc., constituting his stock in trade. The mortgage is in the usual form, and contains the usual privilege to the mortgagee to seize the property whenever he shall feel himself unsafe or insecure.

It is charged by the petitioning creditors that this mortgage was fraudulent and void as to creditors, because made to delay and hinder creditors. On this point I quote the testimony of Mr. Ewell literally as follows:

"When I took this mortgage it was the understanding that he was to go on and sell at retail until I became dissatisfied. I knew that he had been selling at retail, and I also knew that since I took the mortgage, and up until I took possession, he had been selling as before." Mr. Foster testifies: "I have done a retail trade since the mortgage was given, the same as I did before." "I have bought goods such as our business demanded since the mortgage was given."

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On the 20th of May last Mr. Ewell took possession of the property under the mortgage. He says he took possession because he was dissatisfied with the way the store was running. C. M. Smith had told him Foster was some two or three hundred dollars behind on rent. On inquiry, he found indebtedness of Foster of seven or eight hundred dollars to six or seven persons, besides the debts on which Ewell was liable as surety. Ewell had also gone Foster's security on a debt of seven hundred dollars to First National Bank, for money borrowed in February or March last, which has not been paid. He further says: "At the time I took possession under my mortgage, I thought it was necessary to protect my interest, and, in my view, that necessity arose when I learned of the indebtedness of Foster, and because of Foster's failure to make deposits to meet the notes in the bank. Foster told me before I took possession under my mortgage, that times were so hard that it was impossible to make the payments to meet the bank notes and Buck's note. That information contributed towards my action in taking possession of the stock of goods under my chattel mortgage."

Mr. Foster testifies: "At the time Mr. Ewell took possession under his mortgage I could not pay C. M. Smith what I owed him, and one of the notes to the First National Bank had become due and had been renewed because I could not meet it when due. The failure to meet these debts when the same became due was because of the dullness of the times."

There is no evidence tending to show that Foster was insolvent at the time he executed the mortgage; but at the time possession was taken by Ewell under the mortgage, Foster, being a merchant or trader, was unable to pay his debts in the ordinary course of business, and was, therefore, within the meaning of the Bankrupt Law, insolvent.

The questions presented for determination in this matter are, whether the chattel mortgage, with the continued exercise of the right of sale of the mortgaged property by the mortgagor, constitute a fraudulent conveyance, and whether the seizure of the property by the mortgagee constitutes an unlawful preference.

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In the case of *Robinson v. Elliott* (11 N. B. R., 553; 22 Wall., 513), it was determined by the Supreme Court of the United States that a chattel mortgage of a stock in trade, which permits the mortgagor to dispose of the mortgaged goods in due course of trade, is fraudulent in law as to other creditors, and is null and void as to them, without reference to the good faith of the mortgage debt, or the intentions of the mortgagor as to fraud.

The same doctrine was announced many years ago by the Supreme Court of this State, in *Davis v. Ransom* (18 Ill., 396). In that case the court say: "The law gives no sanction to such arrangements, and, however well intentioned in fact, will hold them void as against creditors as tending to encourage and sustain frauds, and to hinder creditors in the collection of their just demands."

This rule has been adhered to in several subsequent decisions of that court, and I understand this to be the doctrine established by the general current of authorities, both in this country and in England, though in some few States a different rule has obtained. And it has also been held by many courts of high authority, that when the agreement permitting the mortgagor to sell does not appear on the face of the instrument, but appears by proof *aliunde*, the instrument is equally fraudulent and void as if the agreement had appeared on its face. (*Gardner v. McEwen*, 19 N. Y., 123; *Russell v. Winne*, 37 N. Y., 591; *Putnam v. Osgood*, 52 N. H., 148; *Collins v. Myers*, 16 Ohio, 547; *Freeman v. Rawson*, 5 Ohio St., 1; *Horton v. Williams*, 21 Minn., 187; *Steinart v. Deuster*, 23 Wis., 136; *Bank of Leavenworth v. Hunt*, 4 N. B. R., 616, 11 Wall., 391; *In re Manley*, 3 N. B. R., 291; *In re Kahley*, 4 N. B. R., 378.) And the Supreme Court of this State in case of *Barnet v. Fergus* (51 Ill., 352), use the following language:

"It was held by this court, in *Davis v. Ransom* (18 Ill., 402), and in *Read v. Wilson* (22 Ib., 377), that a mortgage of a stock of goods, containing a provision authorizing the mortgagor to retain possession for the purpose of selling in the usual course of trade, was fraudulent and void as to creditors. This

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was held to be fraud in law. It is a necessary consequence of these decisions that where the mortgage contains no such provision, but the mortgagee nevertheless knowingly permits the mortgagor to make use of the property in the ordinary course of trade, and in the same way as before the mortgage was made, this would be such a perversion of the mortgage from its legitimate purposes as to withdraw from its protection, and place within the reach of other creditors, all the property which the mortgagee had permitted the mortgagor to hold for sale in the ordinary course of business.

"This principle has been recognized in *Griswold v. Sheldon* (4 Comst., 581), and *Deleware v. Ensign* (21 Barb., 85)," and in the case of *Edgell v. Hart* (9 N. Y., 213), Denio, C. J., held that the existence of a provision permitting sales by the mortgagor, out of the mortgage or in it, would invalidate it as matter of law, and that where the facts are undisputed the court should so declare.

In view of the authorities above cited it would seem to be clear that the mortgage in question, which the mortgagee took (as he himself testifies) with the full understanding that the mortgagor was to go on and sell the mortgaged property at retail, was fraudulent in law and void as to creditors.

But counsel for the debtor insist that while the mortgage may have been void as to creditors, yet it was good as between the mortgagor and mortgagee, and that as the mortgagee took possession of the property before any execution or other lien was obtained on the part of any of the creditors, and before the filing of the petition in bankruptcy, that the mortgage, or at least the seizure of the property under it, is now valid as against the creditors.

Under the State law this position is doubtless well taken. The law of Illinois permits a debtor to prefer some of his creditors to others. But the bankrupt act was intended to prevent such preferences; and the question is thus presented as to whether the seizure of these goods by the mortgagee was such a transfer of the property as to make an unlawful prefer-

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ence within the meaning of the bankrupt act, and consequently to constitute an act of bankruptcy.

If, as I think is clear, the mortgage in question was void as to creditors up to the 20th of May, 1878, when the mortgagee seized the property, then the seizure was the first act which gave it validity as against the creditors, and this was only fifteen days prior to the filing of the petition in bankruptcy. The seizure operated as a transfer of the property to the mortgagee, and enabled him to apply the proceeds of the property to his individual use, and thus gave him a preference over the other creditors.

This question is incidentally passed upon by the Supreme Court of the United States in the case of *Robinson v. Elliott* (11 N. B. R., 553; 22 Wall., 513). In that case the debtor had given a chattel mortgage which permitted the mortgagors to remain in possession of the mortgaged goods, and sell them as before, and supply their place with other goods. The mortgagees seized the goods under the chattel mortgage, and twelve days after such seizure a petition in bankruptcy was filed against the surviving mortgagor. The mortgagees filed a bill praying that an account be taken of the amount due them, and for a sale of the goods.

The Supreme Court held that the mortgage was constructively fraudulent, it appearing upon its face that the legal effect of it is to delay creditors. It was insisted by the mortgagees that if the mortgage is held void in law, still, the delivery of the goods to the mortgagees vests a sufficient lien *prima facie* to enable the mortgagees to enforce their lien in equity. On this point Mr. Justice Davis, delivering the opinion of the court, says :

“The answer to this is, that the case made by the bill does not proceed upon such a delivery at all, but upon the mortgage and seizure under it. Besides, if the appellants (mortgagees) could turn the proceedings into a voluntary pledge by the debtors, it would not help them, for it would violate the preference clause of the Bankrupt Act, as they got the goods only twelve days before the petition in bankruptcy was filed.”

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If the principle held in the numerous decisions above cited is correct, that a mortgage of goods is fraudulent in law where the intention appeared *aliunde* to permit sales of goods in the usual course of trade, then the fact that such permission appears on the face of the mortgage in question in *Robinson v. Elliott* does not make that case, so far as it refers to the preference clause of the Bankrupt Act, distinguishable in principle from cases where such permission is proven *aliunde*.

The decision of Judge Drummond in *Harvey v. Crane* (5 N. B. R., 218), appears to be in point in this case.

In that case the chattel mortgage in question was executed on the 20th of March, 1869, but not recorded until the 5th of March, 1870. It had not been acknowledged as it stood when the decision was rendered, and included after purchased goods, and permitted the mortgagor to go on and sell in the usual course of business, and was void as against creditors under the law of this State. On the 7th of March, 1870, the mortgagee took possession of the property under the mortgage, knowing, or having reason to believe, that the mortgagor was insolvent. On the 30th of the same month a petition in bankruptcy was filed against the mortgagor. The mortgage was given for a *bona fide* loan. After reciting these facts in his opinion, Judge Drummond says :

“ But in this case it is claimed that a mortgage, not valid as against creditors under the laws of this State, has ripened into an effectual lien or transfer by virtue of the possession taken on the seventh of March, because, though the mortgagor was then insolvent, and the mortgagee knew it, proceedings in bankruptcy were not commenced until the thirtieth of March, and the assignee took as a purchaser, with notice of all equities. But there was nothing operative as against creditors until the defendant took possession. As against them, until then, the defendant had no security for his loan.

“ A creditor may obtain a preference from an insolvent debtor with knowledge of the insolvency, if within the limitation prescribed by the law. (*Bean v. Brookmire*, 4 N. B. R., 196.) But the possession must be obtained by a complete act

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within the limitation. Here the mortgage did not create the preference as against creditors that was invalid; neither did the record. It was still, when recorded, an invalid mortgage as against creditors under the law of the State, among other reasons, because as it stood it was an unacknowledged mortgage. That which operated against creditors, if at all, was the taking possession on the 7th of March. It is true it was authorized by the mortgage, and it was, in that sense, the joint act of the mortgagor and the mortgagee, possession being the consummation of the act. The assignee represents the creditors, and any claimed lien which would be void as against creditors generally, would also be void as against the assignee.

“In this case the defendant cannot rely upon the mortgage, because it is invalid as to creditors under the law of the State. He cannot rely on the possession, because it was taken under authority from an invalid mortgage, and because, further, the mortgage was wrongfully used by the defendant to obtain possession, he, at the time, knowing the insolvency of the mortgagor.”

This decision then seems to announce the principle that a chattel mortgage, void as to creditors under the law of this State, and under which the mortgagee has taken possession, having at the time reasonable cause to believe the mortgagor to be insolvent, is also void as against the assignee in bankruptcy, appointed under bankruptcy proceedings commenced against the mortgagor within two months after possession has been taken by the mortgagees; that such taking of possession operates as a preference, and is, therefore, void as against the other creditors, and does not remit the mortgagee to his rights as of the date of the mortgage.

The decision of Justice Woodruff, of the U. S. Circuit Court for the Northern District of New York, in *Smith v. Ely* (10 N. B. R., 553), also appears to be in point. Of the mortgages in question in that case, Justice Woodruff says: “Although it is not in terms so expressed in the mortgages, yet it is clear upon the evidence that the understanding of all parties was, that the mortgagors should continue their business as

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merchants, as such sell the goods then on hand, buy others, and sell them in turn in their discretion, for the purposes of gain."

On the 12th of November, 1870, the mortgagees took possession under the chattel mortgages, and on the 13th of January, 1871, a petition in bankruptcy was filed against the makers of one of the mortgages. As to the effect of such possession, the court says:

"Under these views of the rights of the parties and of the validity of the mortgages, how did the delivery or surrender of possession by the bankrupts to the defendants on the 12th of November, 1870, affect the right of the assignee in bankruptcy. If, as against creditors, the mortgages and the alleged title of the defendants to the property was fraudulent and void, their taking possession in the mere exercise of their claim of the title would not aid them. Their title remained fraudulent and void still, as against creditors.

"If, on the other hand, the assent of the bankrupts to their taking possession, the delivery of the property, and surrender of the keys, were of themselves an appropriation of the property to the payment of the mortgage debt, then the Bankrupt Law pronounces it void, for this reason—both parties then knew that the bankrupts were insolvent; it swept the entire partnership property into the hands of the defendants; it operated, and was clearly intended to operate to give them security and payment to the exclusion of their creditors, and it was within four months next preceding the filing of the petition upon which the defendants were adjudged bankrupts. The defendants can, therefore, gain nothing from this latter view of the transactions." (See also *Smith v. McLean*, 10 N. B. R., 260; *In re Kahley*, 4 N. B. R., 378; *In re Eldridge*, 4 N. B. R., 498.)

This last case was also decided by Judge Drummond, and grew out of chattel mortgages executed in Wisconsin, in March and May, 1868, under which the mortgagees took possession on the 15th of October, 1868. The petition in bankruptcy against the mortgagor was filed on the 19th of October, 1868.

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The court held that, as to the property afterwards acquired under the law in Wisconsin, there was not a valid mortgage, but only authority to take possession, and the rights of creditors, under the Bankrupt Law, must depend upon its effect upon the property at the time the act was done which might be supposed to operate as a transfer. This was the taking possession under the license contained in the mortgage. At that time the mortgagor was insolvent, and the mortgagees had reason to believe it.

The court says: "It is true in this case there was not, in one sense, a transfer made on the 15th of October, 1868, because the instruction or authority to take possession of after-acquired property, as the Supreme Court of Wisconsin construes it, was given in the mortgages executed some months before. But it is not competent for a party to give this authority in relation to property which he may afterwards acquire, and thus prefer a creditor who shall take possession when he is known to be insolvent, and thus avoid the effect of the Bankrupt Law, because literally he has not made a transfer.

"That, certainly, would be a facile method of evading the scope and spirit of the law. In legal effect it was a transfer within the meaning of the law. It was a continuing act from the date of the authority to the taking possession, the last act being the consummation of the transfer, and in this instance the transfer giving a preference, the mortgagor being insolvent, and the mortgagees knowing the fact. It must be treated as if a mortgage were made of the after-acquired property at the time the mortgagees took possession. It was in substance, then, the case described in the 35th Section, and as against the assignee of Eldridge, representing the general creditors, was void."

In view of the authorities above referred to, my conclusion is, that the mortgage in question, and the seizure of the property thereunder, were both acts of bankruptcy, the first as being a conveyance with intent to delay or hinder creditors; the second as operating as an unlawful preference.

Bamberg et al. v. Stern.

All of which is respectfully submitted this seventeenth day of June, 1878.

N. W. BRANSON,
Register in Bankruptcy.

TREAT, J.—Decision of register affirmed.

NEW YORK COMMON PLEAS—GENERAL TERM.

JUNE 17, 1878.

A composition in bankruptcy operates as a satisfaction of debts that were fraudulently contracted.

JACOB BAMBERG et al., appellants, v. JACOB STERN, respondent.

THIS action was commenced in the Marine Court on the 13th of December, 1876, for goods sold and delivered to the defendant. The summons was for a money demand on contract, and the complaint was the ordinary one for goods sold and delivered. The plaintiffs, upon affidavits alleging a sale procured by defendant upon false representations, procured an order of arrest against the defendant therein. On affidavits denying the fraud, the defendant moved to vacate the order of arrest, which motion was denied by Mr. Justice McAdam. The defendant, before the expiration of the time to answer the plaintiff's complaint, obtained an order from Mr. Justice Goepp extending his time to answer, and within the time so extended his answer was served on plaintiff's attorneys. The General Term of this Court thereafter set aside said order of his Honor Judge Goepp on the ground of irregularity, and held that defendant was in default on the 16th day of February, 1877, and its order was affirmed by a General Term order entered 12th October, 1877. On the seventeenth day of February, 1877, a composition in bankruptcy, between the defendant

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and his creditors, was perfected by confirmation of the Federal Court and entry of the composition, and the names, address, and amount of debt of plaintiffs were stated in the schedules of the bankrupt (the defendant herein), as required by the statute in such case made and provided. Immediately after the order of affirmance entered October 12, 1877, which order held that the defendant was in default on the 16th day of February, 1877, the defendant moved the Marine Court, at Special Term, for a perpetual stay of execution, upon papers setting forth the facts above mentioned, with certified copies of the proceedings in bankruptcy. This application was denied by his Honor Justice McAdam. An order was thereupon entered accordingly, November 12, 1877, and upon an appeal from said order, the General Term of the Marine Court reversed the court below.

From the determination by the General Term of the Marine Court the plaintiffs appealed to this court.

Hart & Bamburger, for appellants.

William Strauss, for respondent.

VAN HOESSEN, J.—The only question presented to us is, does a composition in bankruptcy under the Act of June 22, 1874, operate as a satisfaction of debts that were fraudulently contracted? Mr. Justice McAdam, sitting at Special Term of the Marine Court, held that it does not, and gave, as his reason for that decision, that Section 5117 of the United States Revised Statutes declares that “no debt created by fraud shall be discharged by proceedings in bankruptcy.” A composition was not one of the proceedings in bankruptcy referred to in that section, for the law providing for composition was not enacted until 1874, and section 5117 was passed in 1873. The learned Justice said that the laws were in *pari materia*, and that therefore Section 5117 must be held to apply to and qualify the Act of 1874. In that I think he was in error. The Act of 1874 is entitled “An act to amend and supplement” the Bankruptcy Act of 1867. I refer to the title of the Act of 1874 merely for the purpose of giving point to the observation that the compo-

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sition proceeding is a method supplementary to that originally provided for the release of a bankrupt from his debts. A composition is an entirely different thing from a discharge. It is a new way of freeing the bankrupt. The differences between discharge and composition have been repeatedly pointed out. Thus Judge Lowell, in *Ex parte Morris* (12 N. B. R., 170), says that a creditor might vote on a composition though he bought his claim with intent to prevent the adoption of a pending resolution for a composition. In ordinary proceedings in bankruptcy he could not even prove his claim unless he should swear that he had not bought it with a view of influencing the proceedings. And in *Re Haskell* (11 N. B. R., 164) the same learned Judge said that a debtor might compound with his creditor, though he could not obtain his discharge because he had given preference after becoming insolvent.

In *Re Odell* (16 N. B. R., 501), Judge Blatchford said: "The mere fact that a bankrupt has been refused a discharge is not an absolute bar to a composition; a discharge discharges the bankrupt from his debts whether there are or are not assets for distribution. Under a composition money is paid in satisfaction of the debt, the debts are not discharged, they are paid and satisfied with the assent of the creditor." "A composition not being a discharge, the provisions of Section 5110 in regard to a discharge, do not apply to a composition."

The very question in this case has already been twice passed upon, first in *Wells v. Lamprey* (16 N. B. R., 205) and afterwards in *Re Schafer & Wesselhoeft* (17 N. B. R., 116). In *Wells v. Lamprey*, the action was covenant; plea, discharge by composition; replication, debt was created by fraud. The Supreme Court of New Hampshire said that the bankrupt was not discharged, but that he had settled with his creditors the same as if he had gone to each one separately. A portion of the creditors would be unwilling, but when the required majority so declare, the settlement is just as complete and effectual as if every creditor had personally assented to the compromise.

In *Re Schafer*, Judge Nixon, of the United States District Court in New Jersey, after a careful examination of the law

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of 1874, restrained the Marine Court of the City of New York from proceeding in an action pending in that court in which Waldron and Loughran obtained an order of arrest against Schafer & Wesselhoeft for fraud in contracting the debt which was the subject. A petition in involuntary bankruptcy was filed in New Jersey against Schafer & Wesselhoeft on the fifteenth day of December, 1876. On the twenty-first day of December, 1876, the bankrupts proposed a composition. On the following day—22d December, 1876—Waldron and Loughran began their action in the Marine Court. On the second day of January, 1877, Schafer & Wesselhoeft were adjudicated bankrupts. On the twenty-seventh day of March, 1877, the composition resolution was approved by the Court of Bankruptcy. Judge Nixon said that a composition in bankruptcy is so different from a discharge that there may be a valid composition, even though there be no adjudication of bankruptcy. Jurisdiction to restrain the Marine Court from proceeding with the action was derived from that provision of the act of 1874 which empowers the Court of Bankruptcy to enforce in a summary manner the provisions of any composition.

The Act of Congress relating to composition is modeled after Section 126, Chapter 71, 32 and 33 Victoria, which is cited as the Bankruptcy Act of 1869. Congress did not see fit, however, to adopt Section 15, Chapter 62, 32 and 33 Victoria, the Imprisoned Debtor's Act, for that section provides that a debtor who makes any composition shall remain liable for the unpaid balance of any debt that may have been fraudulently contracted, unless the defrauded creditor shall assent to the composition, but that accepting a dividend shall not be construed as an assent to the composition. It is only by virtue of the Imprisoned Debtor's Act that a debtor in England, who has made a composition, is liable to arrest, and as in this country there is no such act there is no way of defeating or modifying the effect of the language of the act of 1874.

The debt of the plaintiffs has been satisfied, notwithstanding the fraud of the defendant in contracting, and the right to an arrest has gone with the cause of action. It is settled in

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England that if the debtor does not perform the composition agreement, the original claim is revived.

The order appealed from should be affirmed, with costs.

J. F. Daly, J., concurs; Daly, C. J., dissents.

UNITED STATES DISTRICT COURT—E. D. NEW YORK.

APRIL 17, 1878.

The debtor filed a voluntary petition in bankruptcy, but objected to being adjudged bankrupt thereon, and no adjudication has ever been made. At the time of filing such petition he also filed a petition for composition. The first meeting of creditors has been held and the resolution of composition adopted and confirmed by the requisite number of creditors. Prior to the conclusion of such meeting, an opposing creditor commenced an action to recover a provable debt described in the debtor's statement, and levied an attachment upon his goods. On application for an injunction to restrain proceedings in such action, pending the proceedings in composition, *Held*, that the debtor is in no position to appeal to the court for protection so long as he objects to being a bankrupt and declines to surrender himself to the court.

Semble, That if the second hearing had been had and the resolution directed to be recorded, the case would be different.

In re ALANSON H. TIFT.

The facts sufficiently appear in the opinion.

Charles Harris Phelps, for creditor.

A. H. Aubrey, for bankrupt.

BENEDICT, J.—This proceedings comes before the court upon the application of a petitioner in bankruptcy for protection and for an injunction to restrain proceedings in an action at law that has been commenced against him.

In February last the petitioner filed his voluntary petition, but, as it appears, made objection before the register to being adjudged bankrupt therein. Accordingly, the register made no adjudication, and neither the petitioner nor any creditor

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having made application to the court therefor, no adjudication has ever been made.

At the same time with his petition in bankruptcy, the petitioner filed also a petition for composition. The proceeding for composition is instituted in good faith by the debtor and seems to have the approval of a greater part of his creditors. It has, however, been strongly opposed by some creditors, and at the time of giving notice of the present application, the first meeting of creditors had not been concluded; when the application came on to be heard it was made to appear that the meeting of creditors had been closed, and the resolution of composition adopted by the requisite number of creditors. The proceedings at the meeting and the propriety of the action of the creditors have been challenged by a single creditor, and doubtless will form the subject of future opposition to the recording of the resolution. This single creditor on the 11th inst., and prior to the passage of the resolution for composition, commenced an action at law against the petitioner to recover a provable debt described in the debtor's statement presented to the creditors at the composition meeting, and levied an attachment upon the goods of the petitioner. The petitioner thereupon made the present application to the court for an injunction to restrain the proceeding at law, pending the proceeding in composition.

On the part of the petitioner it is contended that in all cases where a composition proceeding is pending, the debtor is entitled to be protected by the Bankrupt Court, and reference is made to *Hinsdale's case* (16 N. B. R., 550) as authority for the position. On the part of the attaching creditor it is contended that the power to restrain actions at law against a voluntary bankrupt is conferred by Section 5106, and that Section 5106 has no application here, inasmuch as there having been no adjudication upon the petition in bankruptcy, the debtor is not a bankrupt within the meaning of the section. I agree with the attaching creditor in his construction of Section 5106. The debtor is not a bankrupt within the meaning of that section. The section contemplated an adjudication and a consequent

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surrender of the bankrupt for the examination and disclosure in reference to his property before the protection of the court can be sought. It is with this understanding of the effect of Section 5106 that General Order No. 5 is framed.

If the power exists to protect the petitioner, he not being as yet adjudged a bankrupt, it must be derived by implication from the provisions in respect to composition.

In the matter of Hinsdale, an involuntary case where no adjudication had been made, it was said that the court had the undoubted right to protect the debtor from being harassed with suits, pending proceedings for composition, and in *Alsberg's case* (cited by Blumensteil, p. 36 ; but see *Howes & Macy's case*, 9 N. B. R., 423), a voluntary case where proceedings for composition had been commenced without an adjudication, it was said to be improper to make an adjudication in such a case unless upon the request of the debtor. An expression of my views upon the questions decided in these two cases is not called for by the facts of this case. Neither of those cases furnishes authority for the position that protection from suits is a matter of right in a case like this. Here the petitioner has filed a petition asking to be adjudged a bankrupt, but at the same time so conducted his proceedings—whether properly or not, I do not say—that the result is that he has not been adjudged a bankrupt, and his property remains in his own possession and under his own control. His position is different from that in Hinsdale's case, because there the debtor was denying any act of bankruptcy. If, according to the decision in Alsberg's case, the petitioner was entitled to file his voluntary petition and be adjudged a bankrupt or not at his option, and if, according to the decision in Hinsdale's case, he may be protected although not adjudged a bankrupt, it does not follow that the petitioner is entitled to protection as a matter of right. In my opinion, this being a voluntary case, the petitioner is in no position to appeal to this court for protection until he is adjudged a bankrupt and has surrendered himself for full examination and disclosure in reference to his property and affairs. I can hardly believe that it was the intention of the

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Statute to make the adjudication dependent upon the option of the debtor who has filed his voluntary petition ; but if such be the law, I see no reason why, when, as in this instance, the debtor has exercised his option adversely to an adjudication, the court can be expected to protect him. So long as he objects to being a bankrupt and declines to surrender himself to the court, he has no ground upon which to seek the protection of the court. I have thus far considered this motion in the light of the facts as they stood when the suit at law was commenced. Since that time, as before stated, the meeting of creditors in the composition proceedings has come to a close, and the resolution of composition has been adopted and confirmed by the requisite number of creditors. But I do not see that this fact should affect the decision of this motion. If the second hearing had been had and the resolution directed to be recorded, the case would, perhaps, be varied ; but it is entirely possible that a serious contest may arise before the resolution shall become effective. It may be months before the final termination of the composition proceedings, and the result of the contest cannot be foreseen. It is much in a debtor who, although he has committed an act of bankruptcy by filing a voluntary petition, has prevented an adjudication from being made, to ask the court to give him the protection afforded to a bankrupt during the future progress of such a contest with his creditors.

Application denied.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Proceedings in composition are regularly begun when the petition in bankruptcy alleges facts sufficient to show jurisdiction.

A composition which provides, in addition to an offer in money in deferred payments, that the real estate which the bankruptcy assignee has acquired shall be converted into money for the use of the creditors, is proper.

Debtors are not required by Section 17 of the Bankruptcy Amendment Act, approved June 22, 1874, to attend any meeting in composition except the first.

The creditors at the first meeting are to decide as to the sufficiency of the

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excuse for the absence of the debtor, and their decision should not be disturbed, except for good cause shown.

While the rights of the minority creditors should be carefully protected against all unreasonable acts of the majority, the judgment of the requisite majority should always be allowed to prevail, unless obtained without sufficient consideration or by some unfairness or undue influence.

The Appellate Court will not inquire into the question whether the composition is for the best interests of the creditors, unless specific errors in the action of creditors or the court below can be pointed out which, if sustained, would change the judgment.

The court will refuse to relieve creditors who fail to present their objections at the first meeting in composition, except they make a clear case for equitable interference in their behalf.

In re HERMAN WRONKOW and THOMAS G. HOGAN.

Melville H. Regensburger, for the composition.

James S. Stearns and Cephas Brainerd, opposed.

WAITE, CH. J.—This is a petition, under the supervising jurisdiction of this court in bankruptcy, to set aside an order of the District Court directing that a resolution of creditors, accepting a proposition of compromise made by the bankrupts, be recorded.

The objections are :

1. That the court had no jurisdiction.
2. That the compromise was not payable in money.
3. That Hogan, one of the bankrupts, was excused from attendance at the meetings of the creditors without sufficient cause.
4. That the composition was not for the best interest of all concerned.

There can be no doubt of the jurisdiction of the District Court. Composition proceedings must be had in the court where the suit in bankruptcy is pending. A petition in involuntary bankruptcy was filed against these bankrupts in the District Court, and it alleged facts sufficient to show jurisdiction. Upon this petition an adjudication in bankruptcy was had, and an assignee appointed and qualified. Wronkow, one of the partners, was a resident of the district, and Hogan, the other, appears by attorney in the composition proceedings.

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The offer was of payment in money, but on time, secured by notes. This was the substance of the proposition. By reason of the bankruptcy proceedings, the creditors had already acquired an interest in the real estate which had passed to the assignee by the conveyance of the register.

It does not invalidate the proposition that, in addition to the money to be paid, this real estate was to remain with the assignee to be converted into money for the use of the creditors to whom in reality it belonged. The offer in effect was that the creditors should retain the real estate which they already had, and that the twenty per cent. in money should be paid in addition. There is nothing wrong in this.

The debtors are not by law required to attend any meeting of the creditors but the first, and that is to be considered as continuing until the vote is taken upon the resolution to accept. If, being summoned to a future meeting, they fail to appear, that fact may with great propriety be taken into consideration by the court in determining whether the resolution of acceptance should be admitted to record.

At the composition proceedings, as part of the bankruptcy suit, it would undoubtedly be in the power of the court, upon proper showing made, to compel an attendance; but the law itself does not make it obligatory upon the bankrupt to be present except at the first meeting.

One is to be present unless prevented by sickness or other cause satisfactory to the meeting. Of the sufficiency of the cause the creditors themselves are to decide in the first instance, and their decision should not be disturbed by the court, except for good cause shown. It must in some form appear that wrong has been done to the minority creditors by reason of the vote which was given.

After the District Court has affirmed the action of the majority, this court, in the exercise of its supervisory jurisdiction, ought not to interfere except on a very clear case; while the rights of the minority creditors should be carefully watched and protected against all unreasonable acts of the majority, the judgment of the requisite majority should always be allowed

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to prevail, unless obtained without sufficient consideration or by some unfairness or undue influence.

In this case the excuse presented for one of the debtors was his absence in California, where he resided. This was fairly submitted to the meeting. It seems to have been fairly considered. The meeting was well attended. All the objections made were fully presented and duly deliberated upon. The result was a vote in favor of the sufficiency of the excuse.

The petitioners were not present at this meeting; for some cause satisfactory to themselves they staid away. At the second meeting called by the court to inquire whether the resolution of acceptance had been properly passed, and whether it was for the best interest of all concerned that the resolution should be recorded, the petitioners appeared for the first time. They then complained of the absence of the one debtor at the first meeting, and insisted that he ought not to have been excused.

At their request the resident debtor submitted to a further examination from them, but, notwithstanding all this, a report in favor of the acceptance was again secured, both from the register and the creditors. This being done, the petitioners appeared before the court and still further urged their opposition to the composition. They were again unsuccessful, and now are here. Apparently, every other creditor is satisfied but themselves. If they had availed themselves of their privileges under the law, and had attended the first meeting to urge their views upon the consideration of the creditors then assembled, the result might have been different, and they certainly would have occupied a much more favorable position for inviting the attention of this court to their complaints now.

If creditors interested in composition proceedings fail to attend to their interests in time, they must not expect the courts to relieve them from the consequences of their neglect, except they make a clear case for equitable interference in their behalf. That has not been done here.

It is next insisted that the compromise is not for the best interest of all concerned. The requisite majority of the credi-

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tors at the first meeting thought it was. The same thing occurred at the second meeting, called especially to consider that very question. The register coincided in the opinion of the creditors, and so reported. The District Court, upon full argument, has decided in the same way. This court ought not to interfere under such circumstances, unless specific errors in the action of the creditors or the court below can be pointed out, which, if sustained, would change the judgment.

Mere questions of expediency must ordinarily be considered as settled when the requisite majority of the creditors, the register, and the District Court all agree.

Nothing short of fraud or gross error in judgment should call into exercise the jurisdiction of this court in such a case. That does not appear here. This court is simply called upon to decide upon the whole case that the creditors and the District Court have come to a wrong conclusion as to what is for the best interest of all concerned.

The order of the District Court is affirmed.

UNITED STATES DISTRICT COURT—N. D. ILLINOIS.

The assignee recovered a judgment against a creditor for the value of goods taken by him, prior to the bankruptcy, in payment of his indebtedness. The creditor afterwards paid the amount of such judgment and costs, and proved his debt in the bankruptcy proceedings. On motion to expunge the claim, *Held*, That such payment was a surrender of the preference, and that, in the absence of actual fraud, the creditor had a right to prove his claim.

In re MARTIN E. NEWCOMER.

ON motion to expunge claim. The facts sufficiently appear in the opinion.

F. C. Ingall, for assignees.

Baker & Dale, for creditors.

BLODGETT, J.—The assignee herein applied to the register, to whom the cause was referred, for an order for the re-exam-

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ination of the claim of Field, Benedict & Co., of Chicago, filed herein. Upon testimony taken, and argument of counsel, the register expunged the claim, and objection being made by the creditors, the issue was certified to this court, pursuant to Rule 35.

Newcomer was a merchant in Freeport, in this State, and was indebted to Field, Benedict & Co. for goods sold him in due course of trade, and, as agent of Field, Benedict & Co., took pay for the amount of their bill in goods. Newcomer was declared a bankrupt soon after, and his assignee in bankruptcy brought suit and recovered the value of the goods so taken.

No actual fraud was proven. There was probably enough to create a belief that Newcomer was insolvent, or likely to be so. Since judgment was rendered against Field, Benedict & Co., in the above suit, they have fully paid the sum and the costs, and proved their debt in bankruptcy.

Section 5021 provides: "And if such person shall be adjudged bankrupt, the assignee may recover back the money or property so paid, conveyed, sold, assigned or transferred, contrary to this act: Provided, that the person receiving such payment, etc., had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on this act was intended; and such person, if a creditor, shall not, in cases of *actual fraud* on his part, be allowed to prove for more than a moiety of his debt."

Section 5084 provides that a person who has accepted a preference shall not prove his debt on account of which the preference is made or given, until he shall first surrender to the assignee all property, money, benefit, or advantage secured by him from said preference.

The only question is whether, by the payment of the judgment recovered against them for a preference, Field, Benedict & Co. have surrendered the preference received by them, within the spirit and meaning of Section 5084. I think, there being no actual fraud, and the preference being only constructively fraudulent, these creditors have the right to prove their

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claim. The payment of the judgment is a surrender of the preference obtained.

Motion to expunge overruled.

UNITED STATES CIRCUIT COURT—INDIANA.

The right of action given by Section 80 of the Banking Act to recover back usurious interest is a "claim" or "debt" which passes to the assignee in bankruptcy.

WRIGHT et al., Assignees, etc., v. THE FIRST NATIONAL BANK OF GREENSBURG.

Coffroth & Stuart, Baker, Hord & Hendricks, Dye & Harris, for plaintiffs.

McDonald & Butler, for defendant.

GRESHAM, J.—The declaration alleges that the defendant has reserved, taken, and received usurious interest from the bankrupts. The action is brought to recover double the amount of interest thus paid, and is based upon the thirtieth section of the Banking Act, U. S. Stat. at Large, which reads as follows:

"Every association organized under this act may take, receive, reserve, and charge on any loan . . . interest, at the rate allowed by the laws of the State or Territory where the bank is located, and no more; except that where by the laws of any State a different rule is limited for banks of issue organized under any State laws, the rate so limited shall be allowed every association organized in any such State, under this act. And when no rate is fixed by the laws of the State or Territory, the bank may take, receive, reserve, or charge a rate not exceeding seven per cent. And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of

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debt, twice the amount of interest paid from the association taking or receiving the same."

The defendant demurs to the declaration, on the ground that the plaintiffs, as assignees in bankruptcy, have no legal capacity to prosecute the action. This is the only question presented by the demurrer.

The right of action given by this section, is penal. (*Tiffany v. National Bank*, 18 Wall., 409.)

In the absence of a statute authorizing it, a right to a penalty cannot be assigned, nor a right of action for a tort. (*Gardner v. Adams*, 12 Wend., 297.) The defendant exacted and received usurious interest. Had the bankrupts remained solvent they might have prosecuted an action for double the amount of interest paid. Unless the right of action has been barred, it yet exists, either in the bankrupts or their assignees. It is insisted that because the bankrupts could not have sold or transferred the right of action, if they had remained solvent, that, therefore, their assignees have no legal capacity to prosecute the suit. *Tiffany v. National Bank* (*supra*) was an action by a trustee to recover the penalty given by the statute. The plaintiff recovered, but his capacity to maintain the action seems not to have been directly raised. In the case of *Crocker, assignee, v. First National Bank, etc.* (3 C. L. J., 527), the precise question raised by this demurrer was considered, and it was held by Dillon, J., that the assignee was the "legal representative" of the borrower within the meaning of the Banking Act, and as such could maintain the suit whether the right of action vested in the assignee under the Bankrupt Law or not.

In *Tiffany v. Boatmen's Savgs. Inst.* (9 N. B. R., 245; 18 Wall., 375), the assignee in bankruptcy was allowed to recover usurious interest, which had been paid by the bankrupt in violation of the statutes of Missouri.

In *Meech v. Stoner* (19 N. Y., 26), it was held that an assignee could maintain an action to recover money lost at faro, under a statute which gave the right of action to the loser. (See also *Carter v. Abbott*, 1 Barn. and Cress., 444, and *Gray*

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v. *Bennett*, 3 Met., 522.) In this last case, the assignee of the insolvent debtor was allowed to recover three-fold the amount of usurious interest paid to the defendant, that being the amount allowed by the Massachusetts statutes. This is a well-considered case.

In *Brombey, assignee, v. Smith* (5 N. B. R., 152 ; 2 Bissell, 511), it was held by Miller, District Judge, that the assignee could not maintain an action to recover the penalty given by the statute. And it seems to be conceded that in the case of *Barnett v. Muncie National Bank*, in the Circuit Court of the United States for the Southern District of Ohio, a similar ruling was made by Justice Swayne, and the late Circuit Judge, Emmons, in an oral, but unreported opinion. To the same effect is *Nichols v. Bellows* (22 Vt., 581).

The Bankrupt Act (Revised Statutes, Sections 5044, 5045, 5046, and 5047) vests in the assignee for the creditors the entire estate of the debtor—everything of beneficial interest passes by the deed of assignment, except certain necessary exemptions which are intended to protect the bankrupt and his family from temporary distress.

It is true that rights of action for torts to the debtor's person, such as assault and battery, false imprisonment, malicious prosecution, libel and slander, do not pass to the assignee. While it must be conceded that, under the decision of the Supreme Court, this is an action, in part at least, to recover a penalty, yet there are reasons why claims of this kind should vest in the assignee which do not apply to rights of action for damages growing out of mere torts to the debtor's person. In the right of action given by the Banking Act, the bank exacts and receives from the borrower more than the law allows as a fair compensation for the use of its money. In this illegal way, the bank gets into its possession part of the borrower's estate, money which should go to the creditors of the bankrupt borrower. This demand and receipt of illegal interest by the bank may have materially contributed to the bankrupt's downfall. The recovery allowed by the thirtieth section of the act is "in an action of debt."

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If the assignees are not the "legal representatives" of the bankrupt within the meaning of the thirtieth section of the Banking Act, and the right of action never passed to them under the Bankrupt Act, then, unless the suit has been barred, the bankrupts may sue for and recover the money for their own benefit, when, perhaps, they have already received their full exemptions and have been discharged from all their obligations.

As between the bankrupts and their creditors, this would be unjust, and such a result is not easily reconciled with the chief object of the Bankrupt Law, which is the equal distribution of the insolvent debtor's entire estate amongst all his creditors.

In *Gray v. Bennett (supra)*, "it is very certain," says the court, "that if a creditor of the insolvent debtor should attempt to prove a note under the commission, it would be the duty of the assignee to reduce the amount, if usurious interest had been taken on it, or was reserved in it, and in this manner the creditors would be benefited by such reduction. Why should they not have the advantage of it where the debtor was paid the usurious demand prior to the insolvency and within the time limited by the statute for recovering it?"

I think the assignees are the "legal representatives" of the bankrupts within the meaning of the thirtieth section of the Banking Act; and that the right of action given by said section is a "claim" or "debt" which passed to the assignees under the sections of the Bankrupt Law already cited.

Demurrer overruled.

In re Nims et al.

UNITED STATES DISTRICT COURT—N. D. NEW YORK.

Joint creditors share equally in joint assets, whether their debts are partnership debts or not.

The bankrupts were formerly partners under the firm name of O. L. Nims & Co., and failed without assets. Shortly thereafter they commenced business again as partners, under the firm name of O. L. Nims, agent, and failed, leaving assets. Held, That the creditors of the old firm were entitled to share equally with the partnership creditors in the partnership assets.

In re O. L. NIMS and DAVID LONG.

The facts sufficiently appear in the opinion.

Sherman S. Rogers, for Buell and other creditors.

William H. Greene, for assignee.

WALLACE, J.—The bankrupts were formerly partners under the firm name of “O. L. Nims & Co.,” and as such contracted debts and failed without assets. Shortly thereafter they commenced business again as partners under the firm name of “O. L. Nims, Agent,” and as such contracted debts and failed, leaving assets, which are now in the hands of their assignee in bankruptcy for distribution. The assignee insists that the creditors of O. L. Nims & Co. are not entitled to share with the creditors of O. L. Nims, agent, in the assets of the latter firm, such assets being insufficient to pay the creditors of O. L. Nims, agent, in full.

I am of opinion that the creditors of each firm are to share ratably in all the joint assets of the bankrupts, and that neither Section 5121 of the Revised Statutes, nor the rule of equitable distribution which that section is intended to adopt, precludes the creditors of the bankrupts jointly from resorting to any joint assets of the bankrupts which may exist.

The language of Section 5121 does not in terms prescribe the rule of distribution where debts are proved against the bankrupts jointly, which are not partnership debts; but it

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deals only with the mode of distribution as between partnership creditors and creditors of the partners separately, and where the rights of these classes of creditors are involved, applies the equitable rule that the joint property shall be first applied to pay the joint debts, and the separate property the separate debts of the partners respectively.

The creditors of O. L. Nims & Co. are no more creditors of the bankrupts separately than are the creditors of O. L. Nims, agent; both classes are joint creditors. The creditors of O. L. Nims, agent, can resort to the separate property of the bankrupts as fully as the creditors of O. L. Nims & Co. can. Why should not the latter be permitted to resort equally with the former to any joint assets?

The case may be considered as though the bankrupts had been carrying on business together in two distinct firms at the same time, in which they were the only partners. If that were the case, could it be maintained that the property of each firm should be kept distinct and appropriated first to the payment of the debts of that firm, or would the assets of both constitute a common fund for the payment of all the joint debts?

Neither the language of the Bankrupt Act, nor any principle of equity, nor any rule of administration in bankruptcy, of which I am aware, requires the assets of each concern to be marshaled so that the debts of each shall be paid from the assets of each respectively.

The principles of distribution in equity have their origin in the rights of the creditors at law. At law, the creditors of the firm may resort in the first instance to the separate as well as to the joint property of the partners, while the separate creditors of a partner cannot resort effectually to the joint property, because, upon an execution, they can reach only the interest of the partner, and are thus obliged to invoke the aid of a court of equity to ascertain it through an accounting, in which case the creditors of the firm must first be satisfied, and thus obtain a priority as to the joint assets. But, suppose an execution to be levied in favor of a creditor against all the

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members of the firm upon a joint debt, but not on a partnership debt; here the sale would carry the title of all the partners, and the creditor would not be under the necessity of having an accounting or invoking the assistance of a court of equity. There would thus appear to be a solid distinction between the rights of a creditor of all the partners, and those of one or more partners in the joint property as respects the partnership creditors, and the case would not arise for the application of the equitable rule which postpones the separate creditor to the partnership creditor in the joint assets.

Courts of Bankruptcy marshal assets on equitable rules, and these rules give to creditors all their legal rights, when the enforcement of these rights does not conflict with any equitable principles. The rights at law of creditors of the partners jointly are equal to those of the creditors of the partnership, and no equitable rule is violated if both classes are placed upon an equal footing. Chief-Justice Marshall, in speaking of the English rules for marshaling the joint and separate estates in bankruptcy, says: "The rules which we find laid down by the chancellor for marshaling the respective funds are to be considered merely as equitable restraints on the legal rights of parties, obliging them to exercise those rights in such manner as not to do injustice to others." (*Tucker v. Oxley*, 5 Cranch, 34.)

If the rules of distribution originated in the presumption that a partnership debt was incurred for the benefit of the partnership, and that the property consists in whole or in part of what has been obtained from creditors, and is therefore considered as a primary fund for the payment of such debts, there would be strong reason in favor of the position now taken by the assignee; but after a very careful reading of the books I am unable to find any case in this country or in England which advances this view except the doctrine in *Forsyth v. Woods* (5 N. B. R., 78; 11 Wall., 484). That this is not the foundation of the rule which gives partnership creditors priority over separate creditors as to the joint property seems to be indicated by the cases which postpone the partnership cred-

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itors when there has been a conversion of joint into separate property. It is well settled that partners may, during the continuance of the partnership, by agreement, convert joint into separate estate, or *vice versa*. This conversion determines the character of the property for the purposes of its distribution in bankruptcy. (Collyer on Part., Sec. 881, etc.)

Accordingly, when one partner without fraud sells out to the other, the property becomes separate property, and the creditors of the firm are postponed to the separate creditors of the purchasing partner. If the rule of distribution is founded on the theory that the fund which is derived from the creditors is primarily the fund for their payment, and the law therefore appropriates it to them, it could not be permitted that the debtors themselves, by agreement, should defeat this result.

I have not overlooked the English bankruptcy cases which permit proof between estates where several partners are in bankruptcy, some of whom formed a distinct firm, carrying on a distinct trade from that of the general partnership, and the articles of one trade were furnished by one firm to the other (Story on Part., Sec. 394), by which the appropriation of the assets of each firm to its debts is worked out. In these cases the debts were not the debts of all the partners jointly, nor were the assets those of all the partners; and the result reached was precisely that which could be obtained by applying the joint assets to the joint debts of the several individuals.

My conclusion, therefore, is, that the joint creditors of the partners are entitled to share equally with the partnership creditors in the partnership assets; in other words, that joint creditors share equally in joint assets whether their debts are partnership debts or not.

In re Irons & Coon. Ex parte Adler.

UNITED STATES DISTRICT COURT—W. D. MICHIGAN.

MARCH 18, 1878.

Where an attachment lien fails in consequence of proceedings in bankruptcy, the attaching creditor is not entitled to have his costs allowed and paid out of the bankrupt's estate, unless it is clearly shown that his design was to employ the attachment in aid of bankruptcy proceedings, and that the creditors generally were benefited thereby.

*In re IRONS & COON. Ex parte DAVID ADLER.**Albert Jennings*, for the creditor.*O. H. Simons*, for the assignee.

WITHEY, J.—It has always been held by this court that an attaching creditor is not entitled to have his costs therein allowed and paid out of the bankrupt's estate, where the attachment lien fails in consequence of proceedings in bankruptcy taken against the debtor within the time which renders the attachment void under the Bankrupt Act, unless it is shown that the attachment was instituted in the interest and for the general benefit of creditors, and not for the benefit of the attaching creditor alone. The only ground on which the clause in the Bankrupt Law (Sec. 5044) dissolving attachments commenced within four months of the proceedings in bankruptcy can be justified is, that the facts which will authorize an attachment are generally such as would justify proceedings in bankruptcy against the debtor, and that the creditor attaching intended to secure an advantage or preference over other creditors of the debtor. If attachment liens must give way to an adjudication of the debtor and conveyance to an assignee of his estate, where an execution lien does not yield to such proceedings, it must be for the reason stated, and if so, then it is difficult to see why costs made in such attachment proceeding should be paid out of the estate, unless the attachment is employed merely as auxiliary to the bankruptcy proceeding. If employed otherwise, the attachment has for its object a defeat

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of the purpose of the Bankrupt Act, and to allow the attaching creditor costs out of the estate in such case would be inviting attachments against insolvent debtors instead of discouraging them.

Whenever it is shown that the attachment was levied in aid of the general creditors, and seemed necessary to their protection by seizing the debtor's property in order to protect it until proceedings in bankruptcy could be instituted and a warrant of seizure be issued, I regard it just and proper to allow the necessary costs of the attachment to be paid by the assignee in bankruptcy from assets in his hands, because all creditors are supposed to be benefited by having the debtor's property secured and held to await the appointment of an assignee, in a case where there was good reason to believe the debtor was about to make some improper disposition of his property. But in such cases I have required a plain and full showing that the creditors generally were benefited, and that the attaching creditor's design was to employ the writ of attachment in aid of bankruptcy proceedings. The facts of this case are not within such exception.

There is an exceptional fact in this case, viz.: that composition was proposed and accepted before an assignee was appointed. But as the attaching creditor refused to surrender his lien it became necessary, after the composition was accepted, to choose an assignee and have the bankrupt's estate conveyed to him, under Section 5044, before the attachment could be declared dissolved. We think the fact of the proceedings of composition affords no ground to modify the rule of practice as to paying the costs of the attachment, as we have stated it. An assignee was appointed and the debtor's property assigned; the attachment was thereupon dissolved. The evident design of the attaching creditor was to defeat the operation of the Bankrupt Law.

Application denied.

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UNITED STATES CIRCUIT COURT—W. D. MISSOURI.

1875.

The bankrupt, being the owner of twenty bonds of like character and value held by a bailee, sold six of said bonds to defendant and received pay therefor prior to the bankruptcy. *Held*, That the rights of the purchaser to these bonds were superior to those of the assignee in bankruptcy.

H. B. HAMILTON, Assignee, etc., of the Lexington & St. Louis RR., Co. v. THE NATIONAL LOAN BANK OF ST. LOUIS and M. W. WITHERS.

THE county of Lafayette, in Missouri, in April, 1871, subscribed twenty thousand dollars to the stock of the Lexington & St. Louis Railroad Company, and to pay for the same executed twenty negotiable bonds of the same date, May 1, 1871, payable at the same time, with the same rate of interest, for one thousand dollars each, and numbered from seventy-one to ninety inclusive. By agreement between the county and the railroad company these bonds were placed in the hands of M. W. Withers, in escrow, "to be delivered by him to the railroad company upon the completion of its road, ironed, equipped, and in running order, and operated into the city of Lexington, in said Lafayette County, from Sedalia." There was no other condition attached to the delivery of the bonds, and the bonds themselves were fully executed and ready for delivery on the completion of the road to the place named. When the bonds were put in the hands of Withers, as the agent or trustee for both parties, he executed to the railroad company a bond conditioned to deliver to said company or its order said twenty bonds of the county on the completion of the railroad to the city of Lexington. The twenty bonds were exactly alike, and only distinguishable from each other by difference in the numbers.

Soon afterwards, viz.: on the 29th day of May, 1871, the president of the company sold six of the said twenty bonds to the National Loan Bank of St. Louis for the full value thereof, and received payment therefor, and as evidence of such sale

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delivered to the bank the above-mentioned bond of Withers to the railroad company.

In April, 1872, the bank notified Withers that it had purchased of the railroad company six of the bonds in his hands. In April or May, 1872, the railroad was completed to Lexington, and the company had fully complied with the condition which entitled it as against the county to the twenty bonds. Withers has ever since been in the possession of the twenty bonds, and now holds the same.

On the thirtieth day of May, 1872, one John Reid, claiming to own the same, demanded of Withers "the fourteen bonds issued to the Lexington & St. Louis Railroad Company by the county of Lafayette, dated May 1, 1871, numbered from seventy-one to eighty-five." The contract of sale by the railroad company to the National Loan Bank of St. Louis of the six bonds above mentioned in the hands of Withers did not designate by number, letter, or otherwise which of the twenty bonds the said bank was to get. Withers had only the twenty bonds in his hands.

After the completion of its road to Lexington, the railroad company was put into bankruptcy; and this suit is a contest between the assignee in bankruptcy of the railroad company and the National Loan Bank of St. Louis, as to the right of the respective parties to the six bonds in the hands of Withers purchased by the bank of the company in the manner above described.

The case arose in this manner. One Blair sued the railroad company before its bankruptcy in one of the State Courts, and garnished Withers. Under the statutes of Missouri (1 Wagner's Stats., p. 192, Sec. 52; ib., 565, Sec. 9; ib., 664, Secs. 1, 4), the National Loan Bank intervened by means of a proceeding termed an "interplea," and claimed the six bonds in the hands of Withers under its said purchase, which was prior in date to Blair's garnishment. Afterwards the railroad company was put into bankruptcy in the United States District Court for the Western District of Missouri, and by the *consent* of Blair and the assignee in bankruptcy of the railroad com-

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pany and the National Loan Bank, the case of Blair and the "interplea" of the bank were transferred to said Federal District Court for trial and final disposition. Blair's attachment was dissolved by the Federal District Court, which left the contest as to the six bonds between the bank and the assignee in bankruptcy remaining.

The parties waived a jury and tried the question to the court, and after hearing the evidence the court, upon the issues joined, found for the bank, and entered the following judgment, viz. : "That M. W. Withers (who had answered in the proceeding), Commissioner of Lafayette County, who has in his possession twenty of the bonds of that county, deliver six of the same to the interpleader, the National Bank of St. Louis, and that the assignee in bankruptcy pay the costs."

To reverse this judgment or order the assignee brings the case to this court.

Lay & Belch, and *H. B. Hamilton*, for the assignee in bankruptcy.

H. C. Wallace, *Ewing & Smith*, and *J. L. Smith*, for the National Loan Bank.

DILLON, J.—It is very doubtful whether this case is properly before the court upon the *appeal* of the assignee, or whether any errors of law appear of record properly saved by bill of exceptions or special findings of fact. But as counsel have made no questions of this kind, and have argued the case in this court upon the merits, and as upon the merits it must be affirmed, I will dispose of it upon the assumption that it is rightfully here and that the material facts are those appearing in the statement of the case.

This is a contest between the bank and the assignee in bankruptcy of the railroad company. Before the bankruptcy of the company the bank had purchased of it six of the twenty bonds of the county of Lafayette, then in the hands of Withers. The bank paid the company in full therefor, and the *bona fides* of the transaction is not impeached. But the company could

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not then deliver the bonds to the bank because they were in the hands of Mr. Withers, and because it had not then completed its road to Lexington. Afterwards the bank gave notice to Mr. Withers of its purchase of the six bonds, and in April or May, 1872, the company completed its road to Lexington, thus becoming fully entitled to the bonds, as between it and the county. All this occurred before the bankruptcy of the company. The twenty bonds are still in the hands of Mr. Withers, who claims no interest in them, and is ready to abide the orders of the court.

The assignee in bankruptcy relies upon this point, viz.: That the purchase of the six bonds by the bank is void because the particular six of the twenty which it purchased were not determined by any description thereof, or by separating them from the residue, and therefore, it is argued, the title or property in the six bonds did not pass to the bank, but remained in the company.

As the bonds were all exactly alike in date, amount, time of payment, etc., there are not wanting respectable authorities that the title or property in six of the twenty would pass without any actual separation of them from the others. (*Kimberly v. Patchin*, 19 N. Y., 330; *Russell v. Carrington*, 42 N. Y., 118; *Young v. Miles*, 20 Wis. 615; 23 ib., 643; *Chapman v. Shepard*, 39 Conn., 413; *Pleasants v. Pendleton*, 6 Rand. (Va.), 473; *Waldron v. Chase*, 37 Me., 414; *Warren v. Milliken*, 57 Me., 97; *Cushing v. Breed*, 14 Allen, 376.)

The authorities, however, are not harmonious on the point, and will be found very fully collected in the American edition of Benjamin on Sales (Secs. 78, 81, 308, 318, 355).

It is not necessary to the determination of the present case to decide whether the legal title to the six bonds passed, or could pass to the bank before the particular six were identified, set apart, or appropriated under the contract.

At the very least, the contract between the company and the bank would be valid as an executory agreement on the part of the company, for a consideration actually received, to sell and transfer six of the twenty bonds, in the hands of Withers, to

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the bank ; and this agreement having been made in good faith and the bonds having been paid for by the bank, gave to the bank a right or equity, as against the company or its assignee in bankruptcy, to six of the twenty bonds. This right or equity would attach directly to the bonds in the hands of Withers, and could be enforced against the company if bankruptcy had not supervened, and it is not defeated by the subsequent bankruptcy of the company, to whose rights, and to whose rights only, in this respect, does the assignee in bankruptcy succeed. If the railroad company afterwards sold the remaining fourteen bonds to Reid, and designated the fourteen, leaving six, and only six, in the hands of Withers for the bank, this would amount to an appropriation of the six or a separation of them, and the title of the bank would be unquestionably complete.

In short, if the legal title to the six bonds passed to the bank, the assignee in bankruptcy of the vendor has no right to them. But if the absolute property in the six bonds did not pass to the bank the transaction gave to the bank a consummated and specific right or equity to six of the twenty bonds which are yet in the hands of the bailee, and this right or equity is recognized and preserved to the bank by the Bankrupt Act. Actual delivery of the bonds at the time of the sale is not necessary, for, says WILLES, J., in *Meyerstein v. Barber* (L. R., 2 C. P., 38, 51): "Since the judgment of Lord WENSLEYDALE (then Justice PARKE), in *Dixon v. Yates* (5 Barn. and Ad., 313), it has never been doubted that by the law of England the sale of a specific chattel passes the property to the vendee, without delivery." (Benjamin on Sales, Sec. 308; *How v. Taylor*, 52 Mo., 592; *Mussman v. Holscher*, 49 Mo., 87.) And in equity, "A contract for the sale of chattels, to be afterwards acquired, transfers the beneficial interest in the chattels as soon as they are acquired to the vendee." (Ib., Sec. 81, and cases cited. *Frazer v. Hilliard*, 2 Strob. (S. C.), 309; Story Eq. Juris. (10th ed.) Secs. 421 b, 421 c, 1040.)

In the case under consideration, the railroad company had already paid the county for the bonds by its stock, and was entitled to the bonds in the hands of the custodian thereof as soon

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as its road was completed to a given point; clearly it could transfer the beneficial interest in bonds thus held, and it did so by the sale to the bank, if indeed it did not pass the title to them, which became perfect and absolute when the road was finished and operated to Lexington. But whether the bank has the legal title or only the beneficial or equitable title, in either event its rights are superior to those of the company or its assignee in bankruptcy.

Affirmed.

UNITED STATES DISTRICT COURT—N. D. OHIO.

When, in an attachment proceeding, a judgment is recovered, and process issues thereon to sell the attached property, its lien relates back to the service of the attachment, and there is then no attachment process in existence upon which Section 5044 can operate.

An attachment issued in an action commenced by one A. was levied upon certain lands of the debtor. Subsequently an execution issued upon a judgment recovered by one B. was levied upon the same lands. A. afterwards obtained judgment, and an order was issued thereon to sell the lands attached. The debtor having filed a petition in bankruptcy, the sale was enjoined. The assignee in bankruptcy afterwards sold the lands, and the proceeds proved insufficient to pay both judgments. *Held*, That the process issued on A.'s judgment was not affected by Section 5044; that the assignee, in fact, took nothing, and that A. was entitled to priority.

WILLIAM J. HUDSON, Assignee, etc., of CHARLES T. SNIDER v. ADAMS et al.

APPLICATION to sell real estate and settle liens. The facts appear in the opinion.

S. O. Griswold and J. K. McBride, for Wolf, Mayer & Co.
John W. Hiesley, for the deft., Sloss & Co.

WELKER, J.—From the agreed statement of facts, it appears that, on the 20th of January, 1877, the defendants, Wolf, Mayer & Co., commenced an action against Snider, the bankrupt, in the Common Pleas of Wayne County, Ohio, and,

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having obtained an order of attachment, had it levied the same day upon certain lands of the bankrupt in that county, and described in the petition.

Sloss & Co., also defendants, obtained a judgment on a *cognovit* in the Common Pleas of Cuyahoga County, on the 13th day of January, 1877, upon which execution was issued to the sheriff of Wayne County, who levied it upon the same lands which the sheriff had attached at the suit of Wolf, Mayer & Co., on the same day, but after the attachment was levied. Wolf, Mayer & Co. obtained judgment in their suit on the 13th day of March following, and an order was issued on their judgment to sell the lands attached; but before the sheriff had actually sold the lands (having advertised the same under the order), on the 30th day of April, 1877, Snider filed his petition in bankruptcy, on which he was adjudged a bankrupt on the 1st day of May. At the suit of one of the creditors, this court, on the day before the time for sale, enjoined the sale.

The assignee came into the suit, and it was prosecuted in his name. He has since sold the land, and the proceeds are in court, and are not sufficient to satisfy both judgments. There is no question as to fraud or preference in the manner of obtaining these judgments. It is a mere race for priority between these judgment-creditors. It is contended by Wolf, Mayer & Co. that their lien dates back to the service of the writ of attachment. On the other hand, Sloss & Co., admitting the validity of the judgment, insist that its lien only dates from the time of its rendition, to wit, March 13, 1877, and that their levy previously made has priority.

Wolf, Mayer & Co. cite Ohio Code, Sections 205, 221, and 228, 12 N. B. R., 121; 2 Story, 379. Sloss & Co. cite 14 N. Y. S. C. (7 Hun), 288; 42 Cal., 528; and 37 Conn., 341. Both these parties claim under State liens, which are protected and saved by the Bankrupt Act.

It is, however, contended, on the part of Sloss & Co., that the lien which Wolf, Mayer & Co. otherwise would have had is divested by the operation of Section 5044 of the Bankrupt

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Act. This section declares that the title of the assignee shall relate back to the date of the filing of the petition, and vest in him all the title then held by the bankrupt to real and personal estate, although the same may then be attached on *mesne process*, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceeding.

Undoubtedly this section was made part of the act from various decisions arising under the Bankrupt Act of 1841. In that act, the same as the present, State liens were preserved. In many of the States suits only were commenced by attachment on *mesne process*, and it was held that the lien of judgments obtained thereon related back to the service of the process. (See 2 Story, 379.)

To prevent this sort of preference, Section 5044 was adopted. It is to be observed that this section by its own terms relates to existing attachments. It says that the title of the assignee shall relate back to the filing of the petition, and vest in him the title of property attached on *mesne process*, and *such attachment* shall be dissolved, provided it was such a one within four months from the commencement of the bankruptcy proceeding. In this case, however, Wolf, Mayer & Co. proceeded to and did obtain judgment nearly two months prior to the filing of the petition. By the operation of Section 5044, all the title which Snider had in the land became vested in the assignee. It was bound, however, by both judgments, and subject to their payment; and as the property was insufficient to pay them both, the assignee in fact took nothing. And the question is, does the force of this section operate to discharge the lien which Wolf, Mayer & Co. obtained by the service of their attachment, for the benefit of Sloss & Co., subsequent levying creditors? No question of equity exists. They stand on their legal rights. Such rights as the State law gives them they have, and Wolf, Mayer & Co. have priority, unless Section 5044 operates to discharge and vacate their lien. In the case cited from the 12th Bankrupt Register, substantially this question was decided. In that case personal property was

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attached and sold during the pendency of the attachment proceeding. Subsequently, a judgment was obtained, and the money was ordered applied upon the judgment. After the recovery of the judgment the petition was filed within four months from the commencement of the attachment proceeding. The assignee claimed the money. On very full argument, the court held that the assignee could not recover; that although the property had been seized and sold under the attachment process, when the judgment was recovered it was no longer an existing process, but was part and parcel of the judgment and the money properly applied thereon. In the case cited from the 14 N. Y. Sup. Court, property was attached, and the debtor within a few days afterwards adjudged a bankrupt. Neither the assignee nor the debtor moved to discharge the attachment, and subsequently there was a judgment rendered against the bankrupt in the attachment proceedings, and it was claimed by the attaching creditor that the property attached should be applied in satisfaction of the judgment. The court held it was unnecessary to have moved to discharge the attachment, and refused the order. The case from the 37 Conn. does not bear upon the question. In that case the attachment was levied more than four months preceding the bankruptcy, and on an application after bankruptcy for a full judgment the court held that the plaintiff could only have a qualified judgment subjecting the property attached.

In the case cited from the 42d California the creditor commenced suit against his debtor, and garnished an insurance company. The garnishee answered admitting the indebtedness, but saying it was not due. Subsequently the creditor obtained judgment and issued an execution, but no levy or action was taken thereon. The debtor was adjudged a bankrupt, and the assignee brought suit for the money against the garnishee, making the creditor a party, and it was held that the assignee could recover the money. The court put it expressly upon the ground that this being personal property, the only lien which the plaintiff had was his attachment proceeding, and that he had acquired nothing more by his judgment. The

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court also states that if the execution had been levied the money would have been held by the creditor.

If we look at Sections 205, 221, and 228 of the Ohio Code, it will be seen that the property attached is bound from the date of the service of the order of attachment, and that when the plaintiff has obtained his judgment, upon that judgment an order of sale in the nature of an execution could be issued and proceeded with as an execution issued upon a judgment; and on this order of sale the attaching creditor has priority over judgments levied after the service of the attachment. Section 228 provides that prior to the obtaining of the judgment the attachment may be dissolved. The effect, therefore, of these proceedings is, that when in the attachment proceeding a judgment is recovered, and process issues upon the judgment to sell the attached property, its lien relates back to the service of the attachment. There is then no attachment process in existence upon which Section 5044 can operate. In this case the order was issued, and the sheriff was proceeding to sell. Section 5044 in nowise affected this subsequent process; there was nothing upon which it could operate. By the State law the lien of Wolf, Mayer & Co. has priority, and a decree may be entered accordingly.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

JUNE 6, 1878.

The bankrupts were members of a firm engaged in the lumber business, with their principal place of business at A., in this State. They were also members of other firms engaged in the same business in Canada, but in each of such firms there was another partner, at least nominally. The creditors of the Canadian firms having threatened legal proceedings to sequester the property of those firms in Canada, transfers of said property were made by way of mortgage to such creditors in consideration of advances to carry on the business and to secure payment of the debts of the Canadian firms. This course was recommended by some of the principal creditors of the firm in this State, at an informal meeting of the creditors, as the best thing to be done under the circumstances. It appeared that the transfers were made in good faith. *Held*, That under the

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circumstances the transfers were not preferences within the meaning of the act so as to deprive the bankrupts of their discharge.

The adjudication in this case was made in November, 1873. A petition for discharge had been filed in August, 1875. The present petition for discharge was filed in November, 1876. It was objected that the court had no jurisdiction to grant the discharge, on the ground that a prior petition for discharge was still pending and undetermined. *Held*, That the objection was frivolous; that no discharge could have been granted on the prior petition because not seasonably made, and that the proceedings under it were abandoned when this petition was filed.

Whenever an objection to a discharge rests on facts there must be a specification in order that the bankrupt may produce evidence and that there may be a trial of the fact.

*In re DOUGLAS L. WHITE, SAMUEL W. BARNARD,
and ALANSON S. PAGE.*

Gleason & Carter, for bankrupt.

J. H. Work, E. R. Robinson, and Burrill, Davidson & Burrill, for trustees and opposing creditors.

CHOATE, J.—This is an application for a discharge on the part of Alanson S. Page, one of the bankrupts.

The creditor's petition was filed July 24, 1873, against White, Barnard & Page, composing the firm of White & Co., and they were adjudicated bankrupts November 5, 1873.

Page's petition for discharge was filed November 14, 1876. The trustees and several creditors filed specifications on which testimony has been taken.

1. The first four specifications are for alleged preferences made by the transfer of property situated in Canada, consisting of very valuable rights to cut timber, lumber mills and logs, and other personal property used in and about the business of the two firms of A. S. Page & Co., and Page, Mixer & Co., which property is alleged by the objecting creditors to have been the property of White & Co., the said firms of A. S. Page & Co. and Page, Mixer & Co. being, it is alleged, merely the firm of White & Co. under these names.

The transfers in question are dated June 26, and July 8, 1873, and were made by way of mortgage to Canadian creditors in consideration of advances to carry on the business and in

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trust to secure payment of the debts of the firms of A. S. Page & Co. and Page, Mixer & Co. respectively.

The property appears by the evidence in both cases to have been worth more than the advances and the debts secured thereby provided the business should be continued, but insufficient for the payment of those debts if the property had been closed out under forced or judicial sale, upon the winding up of the business.

The business of White & Co. was that of lumber dealers, and their principal place of business was at Albany. They were also known as the International Lumber Co.

The lumber was obtained largely from Canada, and the two firms of A. S. Page & Co. and Page, Mixer and Co. were established the one at Belleville, Ontario, the other at Collingswood, Canada. The three bankrupts, White, Barnard and Page, were members of both these firms, but in each of the firms there was another partner, at least nominally; in the one William Jones, who acted as the managing partner of the firm of A. S. Page & Co., and in the other Harvey M. Mixer, whose name appears in and who was the resident manager of the firm of Page, Mixer & Co. White & Co. also had branches or closely connected auxiliary firms in Chicago and other places, and they became embarrassed on or before May, 1873, some of their paper then going to protest, and their liabilities on their own account and for accommodation of other parties were very large.

At the time the transfers in question were made, the creditors of the firms of A. S. Page & Co. and Page, Mixer & Co. were threatening legal proceedings to have the property in question, which was ostensibly the property of those firms in Canada, sequestered under the laws of that country relating to insolvent debtors, or seized for the payment of their debts, and if this had been done the evidence shows that the depreciation in the value of the property would have been very great from the immediate cessation of the business which would necessarily have followed.

The objecting creditors insist that even if the firms of A.

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S. Page & Co. and Page, Mixer & Co. were distinct firms from White & Co., the property in question was in fact the property of White & Co., and not the property of those firms, and they also insist that inasmuch as Jones and Mixer were paid fixed salaries and did not share in the capital or the profits, they were not partners in those firms respectively, and consequently that those firms were not distinct from White & Co. and that all this property should have gone to all the creditors of White & Co. equally.

I have not found it necessary to determine whether Jones and Mixer as between themselves and White, Barnard and Page were to be considered partners or not, because there is no doubt of the fact that they were held out to the world as partners by White, Barnard and Page, and the firm of White & Co.

And the firms of A. S. Page & Co. and Page, Mixer & Co., as separate firms with different partners, were allowed to trade and acquire and hold property, borrow money and incur debts on the faith of Jones and Mixer being partners, and generally as to their separate creditors were treated as distinct firms with Jones and Mixer as members respectively, and the property in question was suffered to be in their possession and managed by them as their stock in trade and firm property.

Therefore, without regard to the question very learnedly discussed at the bar, whether the Courts of Canada would give any extra territorial effect to an assignment under the Bankrupt Law of the United States, so that a title under such an assignment to personal property situated in Canada would be superior to liens afterwards acquired or attempted to be imposed under the laws of Canada, I am satisfied that the circumstances under which those transfers were made were such that they were not preferences within the meaning of the Act so as to deprive the bankrupt of his discharge.

They were recommended by some of the principal creditors of White & Co., at an informal meeting of their creditors, as the best thing to be done under the circumstances, in view of the claims and threatened action of the Canadian creditors, in the expectation that by the advances secured for carrying on the

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business in Canada a large surplus would remain for White & Co. or their creditors. In fact the bankrupts simply yielded to what seemed to be a claim on the part of the creditors of A. S. Page & Co. and Page, Mixer & Co. which could not, as they believed, be resisted, and the attempt to resist which would probably have resulted in the entire loss of the property to the creditors of White & Co.

On the evidence I think that the transfers were made in good faith, with the purpose and intention of doing what the bankrupts believed at the time to be for the advantage of all concerned, and in the belief that they would thereby avoid bankruptcy, and also in the belief that the transfers might lawfully be made without injury to the legal rights of the creditors of White & Co.

In fact the transfers resulted in the creditors of White & Co. realizing about two hundred and fifty thousand dollars out of the surplus remaining after payment of the debts of A. S. Page & Co. and Page, Mixer & Co.

2. The objection that the court has no jurisdiction to grant the discharge, on the ground that a prior petition for discharge had been filed August 4, 1875, which is still pending and undetermined, is not valid. No discharge could have been granted under that petition because not seasonably made. The present petition is filed in accordance with the Amendatory Act of July 26, 1876. The proceedings under the first petition were abandoned when this petition was filed. An order might have been entered at any time dismissing the former petition. It can now be entered, if desired, *nunc pro tunc*. The case has been fully tried and heard on the merits under this petition, and the objection is frivolous.

3. The point taken on the argument that Page was a member of other firms, as a partner in which he is indebted, and that said other firms are not in bankruptcy, and that therefore he cannot be discharged because he cannot be discharged from all his debts, is not available to the opposing creditors.

The point involves proof of the fact that there are outstanding and unpaid debts of such other firms. Wherever the objec-

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tion to a discharge rests on facts, there must be a specification, in order that the bankrupt may produce evidence and that there may be a trial of the fact. The case of *In re Plumb* (17 N. B. R., 76), is relied on. The record there shows that the point was raised under a specification duly made and tried.

It is said that the schedules filed in this case show such debts of other firms. But the fact may be that those debts were all paid or discharged before the petition for discharge was filed, or before the testimony was taken. The objection resting on a matter of fact, and not being taken by specification, the bankrupt was not called on to take any notice of what may have incidentally appeared, which if the specifications had covered this objection, might have been evidence against him.

4. The only other objection urged is the withdrawal of certain moneys from the agents of White & Co. for the benefit of Page or his firm of Page & Benson. It is enough to say the evidence does not sustain the specifications.

Discharge granted.

SUPREME COURT—ILLINOIS.

To entitle the bankrupt to a stay of suit pending a determination on his petition for a discharge, the proceedings in bankruptcy must be plead or brought to the knowledge of the court in a proper manner.

In suits before justices of the peace this may be done by motion, based on the transcript of the proceedings in bankruptcy.

On appeal from a justice's judgment a motion to stay suit on the ground of bankruptcy comes too late after verdict; it must be made before trial.

HOLDEN, Appellant, v. SHERWOOD, Appellee.

THE facts fully appear in the opinion.

Holden & Moore, for appellant.

Miss Alta M. Hulett, for appellee.

WALKER, J.—This was an action commenced before a justice of the peace of Cook County by appellee against appellant. A

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trial was had, resulting in a judgment for one hundred dollars and costs of suit. Defendant perfected an appeal to the Circuit Court of that county, and the cause was again tried by the court and a jury, resulting in a verdict for one hundred and thirteen dollars and fifty cents. On the rendition of the verdict in the Circuit Court defendant suggested that he had been decreed a bankrupt, and leave was thereupon asked of the court to file a transcript of the proceedings in bankruptcy, which was granted, and the court thereupon rendered judgment on the verdict. The cause is brought to this court on appeal.

It is urged that the General Bankrupt Act (Rev. Stat. U. S., Sec. 5106), prohibits all creditors from "prosecuting their suits to final judgment against a bankrupt until the question of the discharge of such debtor shall have been determined; and any such suit shall be stayed to await the determination of the court in bankruptcy on the question of discharge, etc." The record contains no bill of exceptions, and it only states that appellant suggested his bankruptcy to the court and asked leave to file the transcript of the record showing his bankruptcy. It nowhere appears that any motion was entered for a stay of proceedings until the question of his discharge should be determined.

Before a justice of the peace a motion accompanied with the transcript and based thereon would be proper practice, as it is not a court of record and pleadings are not required. When based on the transcript alone there must be a motion for an order to stay proceedings. That is the only means by which the court can have anything on which to act. A court would not be authorized to enter such an order of its own motion, nor is it the duty of the judge to make inquiry to learn whether the parties or either of them have become bankrupt, nor can he act on any knowledge he may acquire until asked in an appropriate manner.

It is true the statute prohibits the court from proceeding to final judgment until the question of a discharge shall be determined, but the fact must be pleaded or brought to the knowledge of the court in a proper manner. As well say that if a

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defendant were to suggest that he had paid the debt for which he was sued, and ask leave to, and file a receipt, it should prevent the court from proceeding to try the case. A bankrupt may waive a discharge. The law does not compel him to rely on it, nor does it require a court to allow the discharge simply upon the fact being suggested. To defeat the action it must be pleaded in the same manner as any other defense.

The suggestion that the defendant was a bankrupt was wholly unlike the suggestion of the death of one of the parties, as in that case the court thereby loses jurisdiction of the party by his death, and the court can proceed no further until some person is substituted to represent him. Not so with the bankrupt, as the court still continues to have jurisdiction of his person, and may proceed to trial and judgment, unless he in a proper manner interposes his bankruptcy.

But even if there had been a proper motion it came too late, as the bankruptcy had occurred some five months before the trial, if we may look into the certificate of the register. Appellant should have made his motion for a stay of proceedings based on the transcript before the cause was called for trial. He could not be permitted to lie by and permit the plaintiff to incur the expense of a trial, and when it terminated in a verdict against him then for the first time to ask for a stay of proceedings.

Again, if a motion had been made and in apt time, and disallowed by the court, the motion, the transcript, and all evidence on the hearing of the motion, should have been embodied in a bill of exceptions to become a part of the record in the case; so that in any point of view in which the case can be considered there is no ground for reversing the judgment of the court below, and it must be affirmed.

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NEW YORK COURT OF APPEALS.

JANUARY 15, 1878.

Old debts from which a bankrupt has been discharged are sufficient consideration for judgments subsequently confessed by him for the same indebtedness. Such judgments do not revive the bankrupt's liability upon the old debts, but they become new debts which are not affected by the discharge. Where the defendants in an action brought by creditors to set aside a fraudulent conveyance of the bankrupt desire to avail themselves of the fact that the title to such property had become vested in an assignee in bankruptcy, the fact of the appointment of such assignee, and the assignment to him, must be pleaded as a defense; a plea of discharge is not sufficient to raise that question.

While the certificate of discharge is conclusive evidence in favor of the bankrupt of the regularity of such discharge, it is not so in favor of other parties who seek to use it.

JAMES E. DEWEY et al., Respondents, v. HENRY MOYER et al., Appellants.

THE facts fully appear in the report of the same case in 16 N. B. R., 1.

S. Hand, for appellants.

J. E. Dewey, for respondents.

EARL, J.—This is an action commenced by four judgment creditors of the defendant Eldridge, to procure satisfaction of their judgments out of property placed by the debtor in the hands of the other two defendants, in fraud of his creditors.

Prior to 1858, Eldridge owned a farm, upon which there was a mortgage, and he owed to the plaintiffs, Dewey, Reid, and Dockstader, and the assignors of Coon and to other creditors, large sums of money, and then a scheme was concocted and carried into effect by and between the defendants, the particulars of which are set forth in the complaint and the report of the referee, to procure the transfer of the said farm to the defendants Moyer, who were to permit Eldridge to remain on the farm and cultivate the same in their names, and they were to hold the title to the farm and its products and the proceeds thereof for the benefit of Eldridge, and to restore to him the

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whole thereof, after deducting the liens then existing upon the farm and the costs of the foreclosure of the mortgage; and the referee found that the property was placed in the hands of the defendants Moyer, and accepted by them, with the intent and for the purpose of defrauding the creditors of Eldridge, and that the plaintiff first had notice of the fraud in the month of June, 1870; and he found also that the property thus fraudulently placed in the hands of the defendants Moyer was more than sufficient to satisfy the claims of all the plaintiffs. The referee also found that in August, 1868, the United States District Court at Buffalo duly made a decree discharging the defendant Eldridge from all his debts, and that the judgments mentioned in the complaint were all for debts due plaintiffs which accrued before the said discharge in bankruptcy.

The defendant Eldridge did not answer the complaint, but the defendants Moyer did answer, admitting and denying certain allegations of the complaint, and alleging as the only affirmative defense the discharge of Eldridge in bankruptcy, and the most important question to be determined here is, whether such discharge is a defense to this action.

It may be assumed, without deciding it, that the discharge, upon the authority of the case of *The Ocean National Bank v. Olcott* (46 N. Y., 12), would have furnished a defense to this action but for the facts now to be noticed. Before the commencement of this action in 1870, the defendant Eldridge confessed judgments to the plaintiffs upon all the debts now represented by the plaintiffs, which existed at the time of his discharge, and upon these judgments executions were issued, and returned unsatisfied. The old debts from which Eldridge had been discharged were sufficient considerations for the new judgments confessed. These judgments did not revive Eldridge's liability upon the old debts, but he became a debtor upon the new judgments, and plaintiffs' remedies were confined to them. (*Depey v. Swart*, 3 Wend., 135; *Stearns v. Tappin*, 5 Duer, 294; *Lynbuy v. Weightman*, 5 Esp., 198; *Carson v. Osborn*, 10 B. Mon., 155; *Rice v. Maxwell*, 13 Sm. & Marsh. (Miss.), 289)

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These debts, therefore, being subsequent to the discharge in bankruptcy, were not affected thereby. If, instead of confessing judgments, Eldridge had promised to pay the discharged debts, his discharge would have been no defense to an action to enforce such promise.

It matters not that these debts accrued long subsequent to the fraudulent disposition of the property. The property was placed in the hands of the defendants Moyer in trust for the future benefit of Eldridge. The agreement was, that it was to be restored to him so soon as he should, in bankruptcy or otherwise, be discharged from his debts, and by the express language of the statute such an arrangement is void, both as to existing and subsequent creditors. (1 R. S., 136, Sec. 1.) But the referee found that the arrangement as to the property was fraudulent, and that the Moyers as well as Eldridge were concerned in the fraud, and hence the transfers were void both as to existing and subsequent creditors, and the Moyers became trustees *ex maleficio* for both classes of creditors. (*King v. Wilcox*, 11 Paige, 581; *Savage v. Murphy*, 8 Bosw., 75, S. C., 34 N. Y., 508; *Case v. Phelps*, 5 N. B. R., 452, 39 N. Y., 164; *Mead v. Gregg*, 12 Barb., 653; *Partridge v. Stokes*, 44 How. Pr., 381; *Day v. Cooley*, 118 Mass., 524.)

Judge Story, in Story's Eq. Jur., Sec. 361, says that "When the conveyance is intentionally made to defraud creditors, it seems perfectly reasonable that it should be held void as to all subsequent as well as to all prior creditors, on account of ill faith." In *King v. Wilcox*, the Chancellor said, "Upon a full examination of all the cases, the legal principle appears to be established, that when a voluntary conveyance is made and received with an actual intent to defraud the then existing creditors of the grantor, it is not a *bona fide* conveyance which can protect the grantee against the claims of subsequent creditors." In *Day v. Cooley*, MORTON, J., said: "It is well settled that if a debtor makes a conveyance with the purpose of defrauding either existing or future creditors, it may be impeached by either class of creditors."

The Moyers still have the property fraudulently placed in

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their hands, and they must therefore account for it to the plaintiffs, unless there is good foundation for the further claim made in their behalf, which must now be considered. An assignee in bankruptcy of Eldridge's estate was appointed in 1868, and all his estate was assigned to him, and thereupon the assignee became, under Section 14 of the Bankruptcy Law of 1867, vested with "all the property conveyed by the bankrupt in fraud of his creditors." Therefore the property sought to be reached by the plaintiffs in this action became vested in such assignee as trustee for the plaintiffs and the other creditors, if any, of the bankrupt. But this defense was not set up in the answer. It was not mentioned or alluded to therein. But, as the discharge was set up, and as the appointment of an assignee must always precede the discharge, it is said that the assignment is necessarily implied and alleged. It may be that the necessary inference from the answer as to the discharge is that an assignee had been appointed. The fault with the answer, however, is that this matter is not set up as a defense. There is no notice that the defendants intended to use it as a defense. The court might take notice that the fact existed, but it could not fail also to notice that the defendants did not rely upon it for a defense. And so far as we can perceive, this defense was not mentioned at the trial. The certificate of discharge is, in Section 34 of the Bankrupt Act, made "conclusive evidence in favor of such bankrupt of the fact and the regularity of such discharge," but it is not conclusive evidence in favor of other parties who seek to use it. Hence the defendants Moyer, in order to prove their defense of the discharge of Eldridge, introduced in evidence all the proceedings in bankruptcy from the filing of the petition to the discharge. The plaintiffs objected to them that they were inadmissible under the pleadings, but they were received. Among the papers thus introduced were the appointment of an assignee and the assignment to him. We must infer that these proceedings were introduced and received simply to prove the defense of discharge. They were competent upon that defense, and it would be a trap upon the plaintiffs at any time after the close of the trial to allow

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them to be used for any other purpose. To show still further that this defense was not relied upon at the trial, the referee did not find as a fact that there was any assignment, and he was not requested to find it.

The fact of the discharge, implying as it does that there must have been an assignment, does not necessarily show that the plaintiffs had no cause of action. The creditors did not, upon the appointment of an assignee, cease to be interested in the property fraudulently transferred. The assignee became entitled to take it simply as a trustee for them. He did not become a trustee in any sense for the bankrupt, because he had no interest in the property. He had, by his voluntary transfers, which were void only as to creditors, placed it beyond his control. The creditors being all paid or satisfied, the assignee could not reclaim this property for the benefit of the bankrupt. As to him the law would leave it where he had fraudulently placed it. Hence the real parties in interest were the creditors. If the assignee should refuse or neglect to sue for and reclaim property fraudulently transferred, it is abundantly established that the creditors may commence an action to reach the property, making the assignee, the debtor and his transferees parties defendant. And in such an action the property will be administered directly for the benefit of the creditors. (*Sands v. Codwise*, 2 Johns., 485; *Freeman v. Deming*, 3 Sandf. Ch., 327; *Seaman v. Stoughton*, 3 Barb. Ch., 344; *Fort Stanwix Bank v. Leggett*, 51 N. Y., 552; *Card v. Walbridge*, 18 Ohio, 411; *Phelps v. Curts*, 16 N. B. R., 85, 80 Ill., 109; *Francklyn v. Fern*, Barnardiston, 30; *First Natl. Bank v. Cooper*, 9 N. B. R., 529; *Boone v. Hall*, 7 Bush, 66.)

If the defense had been made in the answer or at the trial that there was an assignment and that the assignee ought to have been made a party, the plaintiffs could have brought him in; or they might have shown that he had been discharged and thus divested of his trust, or that they in fact represented all the debts which the bankrupt owed at the time the assignee was appointed, in which event, they being the only parties interested, the absence of a merely formal party would have been

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disregarded by the court. The Bankrupt Law, Section 2, prescribes a limitation of two years for the commencement of an action by an assignee against any person claiming an adverse interest in the property assigned. Here four years had elapsed before this action was commenced, and the plaintiffs might have shown, if this defense had been insisted on, that although the assignee knew of the fraud, more than two years had elapsed, and he had thus lost the right to sue the Moyers for the property claimed by them. In such case, their trustee having by collusion or neglect lost his right to sue, they certainly would have the right in their own names to commence this action. Here is, therefore, abundant reason for holding that this defense ought to have been set up in the answer, that the plaintiff could have had an opportunity to meet it. The point made as to this defense is entitled to less favor than it might otherwise receive, because the plaintiffs do, in fact, represent all the debts mentioned in the schedule attached to the petition in bankruptcy, except four small debts amounting in the aggregate to less than two hundred dollars, and according to the findings of the referee there will be ample property left in the hands of the Moyers to pay these, if not barred or satisfied in some way. We are, therefore, of opinion that the proceedings in bankruptcy, as they appear in this case, were not a bar to this action.

The claim is also made that plaintiffs Dewey and Coon were practicing attorneys, and that they bought certain of the claims upon which this action is based for prosecution in violation of the statute. It is a sufficient answer to this claim that such a defense is not set up in the answer.

It was not error to allow the plaintiffs to prove declarations of the debtor, Eldridge, made in the absence of the Moyers, bearing upon the question of fraud in the disposition of his property. It had been proved that he and the Moyers had joined together in a conspiracy to defraud his creditors, and in such a case the acts and declarations of either, made in the execution of the common purpose and in aid of its fulfillment, are competent evidence against any of the parties. (*Cuyler*

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v. *McCartney*, 40 N. Y., 221; *Newlin v. Lyon*, 49 N. Y., 661.)

I have carefully examined the other exceptions to which our attention has been called, and it is sufficient to say of them that they were not well taken.

I have not deemed it important to discuss here the facts of this case: The plaintiffs had some difficulties to overcome. There are singular and somewhat extraordinary features in the evidence upon both sides. But it cannot be said that there was not sufficient evidence to authorize the findings of the referee, and hence we cannot interfere with them.

It follows from these views that the judgment must be affirmed with costs.

UNITED STATES DISTRICT COURT—N. D. NEW YORK.

The bankrupts made a general assignment for the benefit of creditors. Subsequently, and before the commencement of these proceedings, the sheriff, under an execution against the bankrupts, levied on the assigned property. The Bankrupt Court, upon application, permitted the sheriff to sell the property levied on and directed him to pay the proceeds to the assignee in bankruptcy, to be held subject to the lien of the execution, if any. After the petition was filed, but before an adjudication had been made, the voluntary assignee commenced an action of trespass against the sheriff to recover damages sustained by reason of the levy. The sheriff defended on the ground that the assignment was fraudulent and void as to creditors, and judgment was rendered in his favor. *Held*, That as to the sheriff the assignee in bankruptcy is in privity with the voluntary assignee, and is estopped by the judgment, and that the sheriff is entitled to the proceeds of sale under the execution.

In re SOLOMON BIESENTHAL and HENRY HEUSCHEL.

BIESENTHAL & HEUSCHEL made a voluntary assignment for the benefit of their creditors, July 19, 1876, to Herman Cohen.

The Sheriff of Erie County, under an execution against Biesenthal & Henschel in favor of Adam, Meldrum & Anderson, levied on the assigned property September 6, 1876.

September 14, 1876, a petition was filed by creditors asking

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that the assignors be declared bankrupts. September 22, 1876, Cohen commenced an action of trespass against the sheriff to recover for damages sustained by reason of the levy. September 26, 1876, an adjudication of bankruptcy against Biesenthal & Heuschel was made, and soon after, upon an application to this court, the sheriff was permitted to sell the goods levied on, and directed to pay the proceeds to the assignee in bankruptcy, to be held subject to the lien of the execution, if any.

The action brought by the voluntary assignee against the sheriff was tried in February, 1878. The sheriff defended on the ground that the voluntary assignment from Biesenthal & Heuschel to Cohen was fraudulent and void as to creditors, and a verdict was found for the defendant.

The sheriff now applies upon petition asking, by reason of the foregoing facts, that he be adjudged entitled to the proceeds of the sale under his execution.

WALLACE, J.—If the voluntary assignment from Biesenthal & Heuschel to Cohen was fraudulent as to the creditors of the former, inasmuch as the sheriff's levy was made prior to the filing of the petition in bankruptcy, the levy conferred a valid lien, viz., the right to seize and sell the property under the execution, both as to Cohen, the voluntary assignee, and as against the assignee in bankruptcy. If the assignment was not fraudulent, the title of the property covered by it had passed to Cohen prior to the levy, and the levy did not confer a lien. The assignment was void as to the assignee in bankruptcy, and has been so determined, not because it was fraudulent as to creditors, but because it was made with intent to prevent the property coming to the possession of the assignee in bankruptcy and from being distributed under the Bankrupt Act. If the sheriff had no lien at the time the petition in bankruptcy was filed, he did not acquire one when the assignment was set aside at the suit of the assignee in bankruptcy. The reasons which led to these conclusions are more fully set forth in *Johnson, Assignee, etc., v. Rogers* (15 N. B. R., 1), and *In re Biesenthal* (15 N. B. R., 228).

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The only question, therefore, to be decided now, is, whether or not the judgment in favor of the sheriff in the action brought by Cohen, the voluntary assignee, whereby it was determined that the assignment was fraudulent, is conclusive upon the assignee in bankruptcy as an estoppel.

Certainly the assignee in bankruptcy, upon setting aside the voluntary assignment to Cohen, gets no better title to the property than Cohen had; he gets what Cohen got and nothing more. Now it has been determined by a court of competent jurisdiction that Cohen did not have title to the property levied on by the sheriff, and that the sheriff acquired a valid lien upon it by his execution. Upon the rule that such a judgment is binding upon privies as well as upon the immediate parties to the action, the assignee in bankruptcy, whose title is derived through Cohen, is estopped by the judgment.

It is argued, however, that the assignee in bankruptcy does not claim under Cohen, but by a paramount title and in hostility to him. In a general sense this theory is correct, but it is not true as to this particular transaction. If it were not for the title of Cohen the sheriff would have acquired a valid lien by his levy, and been entitled to hold the property as against the assignee in bankruptcy; because he had taken it under execution against the owners prior to the institution of proceedings in bankruptcy.

The assignee in bankruptcy, therefore, has no title except that which inures to him through the title of Cohen. Cohen was in a position to insist that an assignment to him, valid as against the execution of the sheriff, stood between the title of the judgment debtors and the sheriff; and the assignee must affirm this position before he can assert any claim against the sheriff. As to the sheriff and the property levied on by him, the assignee in bankruptcy, therefore, claims under Cohen, and is in privity with him.

A decree is ordered adjudging the sheriff's lien valid, and directing the assignee to pay over to the sheriff the proceeds of the sale to the extent of the lien.

Bostwick, Assignee, etc., v. Foster.

UNITED STATES CIRCUIT COURT—VERMONT.

APRIL 19, 1878.

The bankrupt, more than two months before the petition was filed, executed and delivered to defendant, his brother, a mortgage to secure pre-existing debts, but through the negligence of the bankrupt, to whom defendant entrusted it for record, it was recorded within that time. By the laws of the State the mortgage was not "good and effectual in law to hold such lands against any other person but the grantor and his heirs only," without being recorded. In an action by the assignee to set aside such mortgage, *Held*, That it was not fully *made* as against the assignee until it was recorded, and as that was within two months of the filing of the petition, it was void.

J. H. BOSTWICK, Assignee, etc., of LEMUEL P.
FOSTER v. ADDIE M. FOSTER.

THE facts fully appear in the opinion.

WHEELER, J.—This is a bill in equity brought by the orator, as assignee in bankruptcy of the estate of Lemuel P. Foster, to set aside a mortgage executed by the bankrupt to the defendant, his brother, on the 6th day of July, 1876, and recorded on the 1st day of August, 1876, made to secure pre-existing debts. The petition in bankruptcy was involuntary, and was filed September 8th, 1876, more than two months after the making, but within two months of the recording the mortgage. No question is made but that the bankrupt was insolvent at the time of making the mortgage, and continued to be so afterwards. The proof shows there were other debts of which the defendant knew, and that he must have known, if he considered the facts before him, that the mortgage was made to give him a preference over other creditors, and so that it was made in fraud of the provisions of the Bankrupt Law intended for the equal distribution of the property of bankrupts among their creditors, and that he had reasonable cause to believe that the bankrupt was insolvent. Upon these facts, if this mortgage was *made* within two months of the filing of the petition in bankruptcy, within the meaning of the Bankrupt Law under the

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laws of the State, it is void and should be set aside; if not, it is valid and should be upheld.

Under the laws of the State the mortgage was not "good and effectual in law to hold such lands against any other person but the grantor and his heirs only" without being recorded. (Gen. Stats., 448, Sec. 7.) Under this statute the mortgage could not be made effectual against any one but the bankrupt and his heirs without including recording it as a substantial part of the making. If the assignee is a mere representative of the bankrupt, and has only his rights, the instrument is as effectual against him as against the bankrupt, without recording. But, under the Bankrupt Law, the assignee in some senses represents the creditors as well as the bankrupt, and has some rights under some circumstances in their favor that the bankrupt himself could not have. The assignment by the judge or registrar to the assignee conveys not only "all the estate, real and personal, of the bankrupt," subject to the exemptions, but "all property conveyed by the bankrupt in fraud of his creditors" is at once vested in the assignee. Rev. Stats. U. S., Secs. 5044, 5046. Under the laws of the State the bankrupt did not represent his creditors, so that the mortgage, because it was valid against him, would be against them, without registration. (*Hart v. Farmers and Mechanics' Bank*, 33 Vt., 252.)

If a conveyance by a debtor upon a new and valuable consideration might be good against a mere creditor advancing no new consideration, without the registry or any notice of the conveyance, on account of the superior equity of the purchaser, as might appear from the remarks of the learned Chief Justice in the case mentioned, that could not avail the defendant here, for he advanced no new consideration whatever, and, according to his own testimony, did not even seek the security, and can have no superior equity to stand upon.

So under the law of the State, registration of the mortgage was necessary to make it operative for the purpose here sought for it by the defendant. Under the Bankrupt Law it was not fraudulent as to creditors so it would always be void against them. But by the express provisions of the Act it would

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become so upon the institution of bankruptcy proceedings within two months from the time it was made, and the property as against the assignee would be vested in him.

In this view, this mortgage was not fully *made* as against the assignee until it was recorded, and as that was within two months of the filing of the petition, it was void, or because so when the petition was filed as against him.

In the case 14 N. B. R., 510, it was found that an intended security was kept from the registry by agreement from before till within the prescribed time, and that under those circumstances it was not made until registration. In this case it does not appear that there was any express agreement that the mortgage should not be left for record, but whether there was or not it was kept from the record by the failure of the defendant, through the intentional or unintentional neglect of the bankrupt, to whom he intrusted it, to leave it for record, and it was the fault of no one else, and the effect upon the creditors as to notice of the mortgage was the same as if it had been purposely done by express agreement.

The lack of notice which the registry would have given was the result of his own neglect or that of his brother acting for him, and the consequences should fall upon him the same as if he had designedly connived at the lack.

Let a decree be entered that the mortgage be set aside as to the orator, as assignee, and that the defendant be restrained from setting up any claim against the orator as assignee under it, with costs to the orator.

UNITED STATES CIRCUIT COURT—KENTUCKY.

JULY, 1878.

The bankrupt, at a time when free from debt and without contemplation of bankruptcy, conveyed to his wife, without the intervention of a trustee, certain parcels of land to her separate use free from his control. By the deeds conveying the property he expressly reserved to himself a power of revocation in whole or in part, and of appointment to any such uses or persons as he might designate either by deed or last will. *Held*, That

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the settlement would be upheld as against the assignee in bankruptcy of the husband.

The omission to insert a power of revocation in a voluntary settlement will subject the settlement to more or less suspicion.

When a settlement is made by a husband free from debt, when it is induced by no fraudulent motive, when it makes no more than a reasonable provision for the wife, when it confers *any* benefit on her, a court of equity will uphold it. Though the grant may not contain every provision which a chancellor would direct to be inserted in a settlement ordered by himself, though it contains reservations tending to impair the full benefit of the provision made for the wife, yet if the grant confer any substantial benefit on her, so long as she is in the actual enjoyment of that benefit a court of equity should and will protect her.

Powers of revocation and powers of appointment, though they be such as may be exercised by the bankrupt for his own benefit do not pass to the assignee either by virtue of the assignment or of the adjudication in bankruptcy.

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THE facts appear fully in the opinion.

B. H. Bristow and *Jas. A. Beattie*, for plaintiff; *Bijur & Davie*, for defendants.

BALLARD, J.—On the 3d of October, 1872, the defendant, Chas. H. Clifton, being then free from debt, and with a fortune probably exceeding two hundred and fifty thousand dollars, conveyed to his wife, without the intervention of a trustee, a small parcel of land, worth about seven hundred dollars, and assigned to her five policies of insurance on his life, each for ten thousand dollars, but at the time not worth more in the aggregate than twelve thousand dollars. On the 1st of April, 1873, being still free from debt, and with his fortune very little diminished, he made another conveyance to his wife, also without the intervention of a trustee, of two parcels of land, one situated in the city of Louisville and the other in the county of Jefferson. The first parcel was, at the time of this conveyance, and still is, encumbered by mortgage to probably its full value. The other parcel was the homestead of the ancestors of the grantor, and was estimated to be worth eighteen thousand dollars. On this parcel he afterwards erected a dwelling-house which cost eight thousand five hundred dollars.

By both deeds, and substantially in the same terms, the

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property was conveyed "to the said Nannie to hold to her and her heirs forever as her own separate estate, free from the control, use, and benefit of her husband." By both deeds, and substantially in the same terms, power and authority were conferred on the grantee to appoint the parcels of land and each or all of them, or part or parts of each, as often as she might choose to exercise the same, to such uses as she might designate by joint deed with her husband, or by a writing in the form of and to take effect as a devise under the statute of wills of Kentucky, and by both deeds, in substantially the same terms, the grantor expressly reserved to himself power to revoke the grants in whole or in part, and to appoint to any such uses or persons as he might designate either by deed or last will. In default of appointment, or to the extent that the grantor might fail to appoint, each of said parcels of land was to remain to the grantee and her heirs forever as her separate estate, with the powers conferred upon her as above stated.

On the 4th of December, 1875, Clifton filed his voluntary petition in bankruptcy, and was adjudged bankrupt thereon, and the complainant, Stephen E. Jones, was appointed his assignee. In October, 1876, the assignee brought this suit in equity, in which he seeks to have both of the above-mentioned deeds declared void, and thus the clouds removed from his alleged title to the parcels of land and policies of insurance mentioned therein.

The bill proceeds on three grounds, all more or less connected, but still so distinct as to require a separate statement: First—That the making of the two instruments was a contrivance and scheme on the part of Chas. H. Clifton to cheat, hinder, and defraud his *future* creditors. Second—That the conveyances having been made by the husband to the wife, without the intervention of a trustee, are, because of this, and because of the reservations contained therein, especially the absolute power of revocation, void, and so passed no title or interest to the nominal grantee. Third—That by operation of the Bankruptcy Act the property described in the instruments, or at least the powers of revocation therein reserved, passed

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to the complainant as assignee in bankruptcy. I shall examine each of these grounds separately.

The complainant has offered no testimony whatever of the alleged fraudulent intent. He does not even allege that the grantor at the time the conveyances were executed owed anything. The uncontroverted proof is that he was then free from debt; that he was not then engaged in trade; that he did not contemplate engaging in trade or contracting debts; that he was an indiscreet young man, who, though possessed of a large fortune, might squander the whole in reckless gaming and dissipation; that the settlements were made at the suggestion of his more prudent wife, and did not embrace more than one-sixth of his estate.

That Clifton might, under these circumstances, by *proper conveyances*, have settled on his wife this amount of property, free from all claims proceeding from his future creditors, or from his assignee in bankruptcy, is indisputable. The authorities everywhere sustain such settlements. (*Sexton v. Wheaton*, 8 Wheat., 229; *Hindes v. Longworth*, 11 Id., 199; *Haskell v. Bakewell*, 10 B. Mon., 206; *Lloyd v. Fulton*, 91 U. S., 479; *Smith v. Vodges*, 13 N. B. R., 433; 92 U. S., 183.) Authorities to the same point might be multiplied indefinitely.

The learned counsel of complainant themselves do not dispute that such settlements are generally unimpeachable. Their contention is that the settlements in controversy here were not made by *proper conveyances*; that the conveyances being made by the husband to the wife without the intervention of a trustee are void in law, and that by reason of the powers of revocation reserved they are void both in law and in equity.

It thus appears that the complainant does not now ask relief on the ground of the distinct fraud alleged. If he attaches any importance to the allegation of fraud contained in his bill, it is only because he considers that a deed made by a husband to his wife, containing a reservation of an absolute power to revoke it, is *per se* fraudulent. Thus considered, the complainant's first ground becomes blended with the second, and one

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and the same with it. I proceed, therefore, to consider the second ground.

Under the common law system the husband and wife are, for most purposes, regarded as one person. As a result of this legal unity, their contracts with each other, whether executory or executed, in parol or under seal, are void. This doctrine, it must be confessed, has little foundation in reason. It is wholly unknown in that enlightened system of jurisprudence which, coming down to us from the ancient civilizations, now prevails on the continent of Europe, and it has only a faint recognition in the system of equity jurisprudence which in England, and in this country, has grown up by the side of the common law. In equity the husband and wife are for many purposes treated as two persons. Whilst at law all the personal property of the wife becomes on marriage the property of the husband, and the entire management and profits of her real estate pass to him, in equity she may not only own and manage her real and personal estate, but she may dispose of it free from the control of her husband. True, it was at one time doubted whether any interest in either real or personal property could be settled to the exclusive use of a married woman, without the intervention of trustees; but for more than a century and a quarter it has been established in courts of equity that the intervention of trustees is not indispensable, "and that wherever . . . property . . . is settled upon a married woman, either before or after marriage, for her separate and exclusive use, without the intervention of trustees, the intention of the parties shall be effectuated in equity, and the wife's interest protected against the marital rights of her husband, and of his creditors also." (2 Story's Equity Jurisprudence, Sec. 1380.)

Nor is it at all material whether the settlement is made by a stranger or by the husband himself. In either case the trust will attach upon him, and will be enforced in equity. It is now universally held that a settlement made by a husband on his wife by direct conveyance to her, will be enforced in the same manner and under the same circumstances that it will be

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when made by a stranger, or when made to a trustee for her exclusive use. (*Shepard v. Shepard*, 7 Johns. Ch., 57; *Jones v. Obenchain*, 10 Gratt., 259; *Sims v. Rickets*, 35 Ind., 181; *Thompson v. Mills*, 39 id., 528; *Putnam v. Bicknell*, 18 Wis., 335; *Burdens v. Amperse*, 14 Mich., 91; *Barron v. Barron*, 24 Vt., 375; *Maraman v. Maraman*, 3 Met. (Ky.), 84; *Wal-lingsford v. Allen*, 10 Pet., 583.)

All voluntary conveyances, whether made wholly without consideration or upon the meritorious consideration of love and affection, are scrutinized and regarded with some suspicion in courts of equity, when they are sought to be impeached by creditors. But I have been referred to no case, and I have found none which hints that a reasonable settlement made by a husband, free from debt, on his wife by direct conveyance to her, is any more impeachable than when it is made through the intervention of trustees. Settlements made in either mode, when uncontaminated by actual fraud, are unimpeachable by subsequent creditors.

It may be admitted that a power of revocation, inserted in an assignment made by a debtor for the benefit of his creditors, would render such assignment constructively fraudulent, and therefore void. (*Riggs v. Murray*, 2 Johns. Ch., 576; 15 Johns., 571; *Tarback v. Marbery*, 2 Vt., 570.) But such power of revocation has never been held to affect a family settlement. On the contrary, in the above case of *Riggs v. Murray*, Chancellor Kent expressly declares that "family settlements may often require such powers of revocation to meet the ever-varying interests of family connections." Moreover, it is the well-settled practice in England to insert such powers in such settlements, unless, indeed, the sole object of the settlement is to guard against the extravagance and imprudence of the settler. Indeed, ever since Lord Hardwicke's time, the failure of the conveyancer to insert a power of revocation in a deed of family settlement has been regarded as a strong badge of fraud. (*Huguenin v. Baseley*, 14 Vesey, 273.)

In some of the later cases such settlements have been

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annulled at the suit of the settler, apparently on the sole ground that they did not contain a power of revocation.

In *Coutts v. Acworth* (L. R., 8 Eq., 558), it was held that "the party taking a benefit under a voluntary settlement . . . containing no power of revocation, has thrown upon him the burden of proving that there was a distinct intention on the part of the donor to make the gift irrevocable." In *Wollaston v. Tribe* (L. R., 9 Eq., 44), the same rule is recognized and enforced. In *Everitt v. Everitt* (L. R., 10 Eq., 405), the Chancellor, in annulling a deed of settlement made by a young woman soon after she arrived at age, chiefly on the ground that it contained no power of revocation, says, in substance: "The sole object of the settlement being to protect the settler and her children, if she married, had I been called on for advice, I should have said: 'Have proper trustees, give her a voice in the selection of new trustees, and give her a power of revocation with the consent of the trustees.'"

In *Phillips v. Mullings* (L. R., 7 Ch. App., 244) the Court of Appeal recognizes the same general rule, but in that case refused to annul the settlement, though it contained no power of revocation, on the distinct ground that the settlement was made by a young man of improvident habits to guard against his own folly, and "the deed was explained to him and the particular clauses brought to his notice." "Those who induce," said the Lord Chancellor, "a young man of this description to execute such a deed, are bound to show that the deed is in all respects proper, or, if the deed contains anything out of the way, that he understood and approved it. . . . It is not necessary to show that the usual clauses inserted by conveyancers were explained, but any unusual clauses must be shown to have been brought to his notice, explained and understood." In *Hall v. Hall* (L. R., 14 Eq., 365) the Vice Chancellor regarded the rule as so firmly settled that he felt impelled to annul a settlement twenty years after its execution, simply because it did not contain a power of revocation. The same rule has been recognized and adopted in the United States. (*Russell's Appeal*, 75 Penn. St., 269; *Garnsey v. Mundy*, 24 N. J. Eq., 243.)

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Some chancellor has intimated that a voluntary settlement partakes very much of the nature of a last will, and that it should be scarcely less revocable.

I feel much difficulty in yielding assent to the extreme doctrine announced in some of these cases, and I am glad to observe that it is somewhat modified and limited by the late case of *Hall v. Hall*, decided by the Court of Appeal in chancery in 1873 (L. R., 8 Ch. App., 430). I quite agree with what Sir W. M. James, L. J., says in this case: "The law of this land permits any one to dispose of his property gratuitously if he pleases, subject only to the special provision as to subsequent purchasers and as to creditors. The law of this land permits any one to select his own attorney to advise him, and it seems very difficult to understand how this Court could acquire jurisdiction to prescribe any rule that a voluntary conveyance, executed by a person of sound mind, free from any fraud or undue influence of any kind, and with sufficient knowledge of its purport and effect, should be void, because the attorney of his own selection did not advise him to insert a power of revocation, or did not take his express direction as to the insertion or omission of such power." The true rule is that laid down by Lord Justice Turner, in *Toker v. Toker* (3 De G., J. and S. 487), that the absence of a power of revocation is a circumstance to be taken into account, and is of more or less weight according to the circumstance of each case.

In the case now before me I think it could not be seriously contended that, had powers of revocation been omitted from the conveyances made by Clifton, this fact would have been entitled to much, if any, consideration, in a suit brought by him to annul the settlements. To such a suit the Chancellor might have said, as Chancellor Hatherly did in *Phillips v. Mullings*: "You were an exceedingly indiscreet and improvident young man. You made the settlements to guard against your own folly and extravagance. Of what advantage would it have been to place the money in this way, out of your control, and then give you power to destroy the limitations whenever you pleased."

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But, whatever may be the true doctrine, all of the foregoing cases and many more that might be cited, certainly do establish that it is ordinarily proper to insert a power of revocation in a voluntary settlement; nay, more, that the omission of such a power will subject the settlement to more or less suspicion. Certainly the practice in England for centuries has been to insert such a power in family settlements.

A practice which is thus approved by time, and which has received the sanction and enconium of courts of equity in both England and America, cannot be regarded as vicious or immoral. Should I hold that these settlements of Clifton are fraudulent and void as to his subsequent creditors simply because they contain powers of revocation, I should overturn an ancient practice and a long course of decisions; nay, I should hold that courts of equity have themselves advised frauds to be committed.

The fact that Clifton inserted powers of revocation in his settlements, so far from proving that he contemplated defrauding his future creditors, tends to show the contrary. Should he simply revoke the settlements, then of course the property conveyed would revert to him, and be liable at law for all his debts. And should he exercise the power of appointment for even the benefit of a stranger, then, according to an unbroken current of authority, the whole estate appointed would be liable in equity to his debts. (*Thompson v. Towne*, 2 Vern., 318; *In re Davie's Trusts*, L. R., 13 Eq., 163; *Williams v. Lomas*, 16 Beav., 1; *Petre v. Petre*, 14 id., 197.) If, then, he had meditated a fraud he would have omitted the power altogether. He would have relied altogether on the affection and beneficence of his wife to provide for him. To contend that he intended to defraud his creditors, and at the same time to exercise the power of revocation arbitrarily, is to maintain a contradiction, since, as we have seen, the exercise of the power would, *ipso facto*, render the property liable in equity for his debts, unless, indeed, we can assume that he was gifted with a foresight which none of the facts warrant. A man, it is true, might make a voluntary settlement on his wife, and, contemplating that he

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might be adjudged a bankrupt in the future and be discharged from his debts, reserve a power of revocation for the very purpose of reinvesting himself in such contingency with the property, relying upon holding it free from debts contracted before bankruptcy. It is by no means certain that such a reliance would be safe. It is by no means certain that such a device would not be pronounced a fraud on the Bankruptcy Act. But assuming that it would not be fraudulent, there is nothing in the present case to suggest that the grantor had any such forethought or was actuated by any such motive. At the time of the settlements he was not only free from debt, but possessed of a large estate. He was not engaged in trade, and all the testimony shows that nothing was farther from his contemplation than bankruptcy. That he did in fact become bankrupt in the short space of two years is partly explained by the large shrinkage in the value of real property, and the decrease in its rents, but it is best accounted for by his frank confession that he has squandered much in reckless dissipation and gaming.

I do not mean to intimate that Clifton, having regard to the motive and circumstances which prompted these settlements, should not have reserved a power of revocation. Had he known his own habits as well as his acquaintances knew them, and had his motive been solely to guard against his follies, it would have been more consistent with that motive to deprive himself of all dominion over the estate settled. But he could not know himself as others knew him, and he doubtless had implicit faith that, even should misfortune overtake him, his affection for his wife would be a sufficient guaranty that he could not be persuaded to strip her of his bounty.

The settlements being of his own pure bounty, he might well wish to reserve to himself power to modify the limitations of them according to the future necessities and exigencies of his family. Then, too, the grantor has given reasonable explanation of the particular reservations contained in these deeds. He says that, at the time they were made, he contemplated removing to California, and that his object in reserving the powers of revocation was that he might change the investments from

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Kentucky to California. He did not expect to exercise the powers for his own benefit; he did not know that he could do so. He only contemplated settlements in California to the same uses declared in the original conveyances.

This suggestion derives additional force from the uncertainty in which the law of Kentucky stood at the time the conveyances were made in respect to the power of a married woman over her separate estate.

The Revised Statutes adopted in 1852 had, in effect, destroyed separate estates. They had, in effect, provided that where real or personal property should be conveyed or devised to the separate use of a married woman she should not alienate the same by joining her husband in an ordinary conveyance or in the exercise of a power, except when the estate was a gift, and then it might be conveyed by the consent of the donor, or his personal representative.

This provision was so anomalous that it gave much perplexity to the legal profession and produced much litigation. It was frequently amended, but, even down to the date of the settlements in question, its precise meaning and operation were not determined. So uncertain was its construction that timid lawyers might have been found who would not have advised the acceptance of a conveyance from husband and wife of an estate conveyed by the husband to the separate use of the wife. At any rate, Clifton might well have thought it best to guard against the uncertainty by reserving to himself a power which would avoid all difficulty.

Every grantor in England has, by virtue of the second Section of the statute of 27 Elizabeth, the substantial right to revoke and annul his voluntary conveyance, since such conveyance is declared by said statute to be fraudulent as to subsequent purchasers for value, with or without notice. (*Dolphin v. Aylward*, L. R., 4 Eng. and Irish Appeals, 486; Roberts on Conveyances, 39, 40 and 41.) A grantor may, therefore, revoke or annul his voluntary conveyance at any time by conveying the property included in such conveyance to a purchaser for value. But the statute is limited in its remedial operation to

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purchasers, and, consequently, such settlements cannot be defeated by subsequent creditors. (*Dolphin v. Aylward*; *supra*.) So, also, the fifth Section of the same statute, which makes all conveyances containing powers of revocation fraudulent and void as to subsequent purchasers, does not extend to creditors. Voluntary settlements, whether they do or do not contain powers of revocation, cannot be assailed by creditors unless they are fraudulent. They are revocable by the grantor either by virtue of the express power reserved or by virtue of a subsequent conveyance for value, but it has never been held that they are on this account fraudulent as to creditors.

But, say complainant's counsel, Mrs. Clifton's title is but the "ghost of a title;" that the legal title is or was in her husband, who reserved to himself absolute power to revoke or to appoint to new uses, and that, therefore, it is not such a title as a court of equity will uphold.

I know it is sometimes said that a court of equity will not enforce every deed made by a husband to his wife. (Bishop on the Law of Married Women, Section 717.) The cases usually cited to support this view are *Beard v. Beard* (3 Atk., 72); *Moyse v. Gyles* (2 Vern., 385); *Stoit v. Ayloff* (1 Ch. Rep., 33). Of all these cases it may be said that they were decided at a time when the rights of married women were not so fully acknowledged or so zealously protected by courts of equity as they are at the present day. It is also to be observed that in the first case the gift was so extravagant as to excite just suspicion of fraud and undue influence. In the second the court refused to aid the defective grant on the ground that it was without consideration. In the third the contract was executory. None of these cases would at all impeach a grant containing no more than a fair provision for the wife, and, if they would, they are opposed to the cases heretofore cited in this opinion, to the well-settled doctrine of the Supreme Court of the United States, and to the whole current of later authority.

When the settlement is made, by a husband free from debt, when it is induced by no fraudulent motive, when it makes no more than a reasonable provision for the wife, when it confers

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any benefit on her, I can conceive of no reason why a court of equity should decline to uphold it. Though the grant may not contain every provision which a Chancellor would direct to be inserted in a settlement ordered by himself, though it contains reservations tending to impair the full benefit of the provision made for the wife, yet if the grant confer any substantial benefit on the woman, so long as she is in the actual enjoyment of that benefit, a court of equity should and will protect her.

Again, complainant's counsel, whilst they admit that a husband may, by direct conveyance to his wife, make a provision for her which will be enforced in equity, whilst they substantially admit that the provision made by Clifton for his wife was reasonable, whilst they admit that the grants made by him are not void, simply because of the powers reserved in them, yet they somehow insist that all these things combined vitiate the deeds. Their contention is that, as the legal title remained in the husband, notwithstanding the alleged conveyances, and that as this legal title is coupled with absolute dominion over the property, as a legal consequence of the reserved powers, the whole right and property remained in the husband, and passed on his bankruptcy to his assignee. But if, as we have seen, the husband may make a conveyance to his wife which will be upheld in equity; if, as we have also seen, the reservation of a power of revocation or of new appointment does not render such settlement void, it is impossible to conceive that the union of the two particulars in the same instrument would destroy it. It is inconceivable that the mere union of two objections, each of which is a phantom, can render the compound substantial.

It must not be overlooked that complainant himself has appealed to a court of equity. In this court Mrs. Clifton's title is as complete as if she had been a *feme sole* when the conveyances were made her. The husband's right and interest are not recognized in this court. Every argument, therefore, which is founded on the notion that any substantial title or interest remains in him can have no force in this forum.

The last proposition of complainant's counsel is that by

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operation of the Bankruptcy Act the property embraced in these settlements, or at least the powers therein reserved, which might be exercised by the grantor for his own benefit, passed to his assignee in bankruptcy.

We have seen that the title which the bankrupt at the time of his bankruptcy held in the property claimed was held in trust for his wife. Now, by the express terms of the statute, property so held does not pass to the assignee in bankruptcy. Section 5053 of the Revised Statutes provides that "no property held in trust by the bankrupt shall pass by the assignment."

To ascertain what property does pass to the assignee in bankruptcy, reference must be had to Sections 5044 and 5046. The first of these sections provides that "as soon as the assignee shall be appointed and qualified, the judge or . . . register shall . . . assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee." The second provides that "all property conveyed by the bankrupt in fraud of his creditors, all rights in equity, choses in action, patent rights and copyrights, all debts due him, or any person for his use, and all liens and securities therefor, and all his rights of action for property or estate, real or personal, and for any cause of action which he had against any person arising from contract or from the unlawful taking or detention or injury to the property of the bankrupt; and all his rights of redeeming such property or estate, together with the right, title, power, and authority to use, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee . . . be at once vested in such assignee."

It will be perceived that powers of revocation and powers of appointment, though they be such as may be exercised by

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the bankrupt for his own benefit, are not enumerated among the things which passed to the assignee either by virtue of the assignment or of the adjudication in bankruptcy. The "power" which is enumerated and does pass, is only the power to sell, manage, dispose of, sue for and recover, or defend the property and rights which do pass.

A power is not property or an estate. A power to convey or appoint property may be lodged in one having no interest whatever in the property over which the power is to be exercised, or in one having an estate or interest in it. But in either case the power is distinct from the estate. It may be that a grant of property to A, to dispose of it as he should please, would invest him with a complete title; but a grant to A for life, with remainder to such persons as he should by deed or will appoint, will not give him the absolute interest, although he might acquire it by the exercise of the power. (1 Sugden on Powers, 120; *Maundrell v. Maundrell*, 10 Vesey, 246; *Reid v. Shergold*, id., 371; *Burleigh v. Clough*, 52 N. H., 267; *Collins v. Carlisle's Heirs*, 7 B. Mon., 13; *McGaughey's Adm'r v. Henry*, 15 id., 383.) So a conveyance by A to B and his heirs in trust for A for life, remainder to such persons or uses as A should appoint, and in default of appointment in trust for C and his heirs, would leave or vest in A a life estate only. Or, if A should convey to B in trust for himself for life, reserving to himself an absolute power of revocation, still A would have only a life estate in the property limited. The power of revocation reserved would neither render the conveyance void nor have the effect of enlarging his estate. The learned judges who decided the case of *Willard v. Ware* (10 Allen, 263), certainly so understood the rule, else they need not have troubled themselves with the perplexing question presented in that case, whether the power of appointment reserved in the deed, which was there the subject of consideration, had been actually exercised.

The Bankruptcy Statute of 13 Eliz. "enables the commissioners to dispose of any estate for such use, right, or title as such offender (bankrupt) then shall have in the same which he

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may lawfully depart withal." And the statute of 21 James I. directs bankrupt laws to be expounded most favorably for the relief of creditors. I quite agree with Sir Edward Sugden when he says that "as a power is a mere right" to declare the trust of an estate, upon which declaration the statute of uses immediately operates, and, as it is therefore clearly a use, interest or right which the bankrupt "may lawfully depart withal," there is considerable ground to contend that the bargain and sale of the commissioner should have the same operation as the execution of the power by the bankrupt whilst solvent would have had, but such was never in fact the construction of these statutes. In *Townshend v. Windham* (2 Vesey, Sr., 1), and in *Thorpe v. Goodale* (17 Vesey, 388), Lord King is said to have held that in the case of a tenant for life, with power to charge £100, the power was not such an interest as would pass to the assignees.

Holmes v. Coghill (7 Ves., 498) was thus: Sir John Coghill, under a settlement made by himself in 1757, reserved the power to himself to charge the estate, situate in certain counties, with any sum not exceeding £2,000. Sir John was also entitled to other estates, remainder in tail to his oldest son. The son arrived of age in 1787, and thereafter he and the father suffered a recovery, and then made a settlement. This settlement embraced all or some of the property mentioned in the settlement of 1757. It expressly extinguished the power reserved in the settlement of 1757, but it directed the trustees to raise such sum, not exceeding £2,000, as Sir John should direct, and pay the same to him or his assigns; or, if the same should not be raised and paid over in his lifetime, then upon trust to raise the same at such time and pay the same to such person as Sir John should appoint. By his will, dated in 1775, and therefore before this settlement, Sir John gave the sum of £2,000, to be raised under the power, to be applied to the payment of his debts. There was a codicil to this will which bore date subsequent to the settlement of 1787, but it took no notice of this power. The bill was filed by creditors. Held by the Master of the Rolls, Sir Wm. Grant—First: That the

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power reserved in the original deed of 1757 was discharged by the deed of 1787. Second: The will refers only to the power reserved in the deed of 1757, and consequently it is no execution of the power reserved in the deed of 1787. Third: There is an evident difference between a power and an absolute right of property. Fourth: Equity will aid the defective execution of a power, but it cannot itself execute a power. The case was affirmed on appeal (12 Ves., 206). On the appeal it was urged that there is a difference between an estate to be created under a power which must be limited to a third person and one which may be limited to the donor himself. It was conceded that in the first case the power must be asserted, but in the latter it was strongly insisted that, as the donor had the same power over the estate which he had over his own estate, it should, in equity at least, be equally subject to his debts. But the court rejected the distinction, remarking: "If the argument in support of this appeal prevails, there must be an end of the distinction between the non-execution and the defective execution of a power."

In *Thorpe v. Goodale* (17 Ves., 388; S. C., 17 Ves., 460) one who had been adjudged a bankrupt was seized for life of a certain estate, with a general power of appointment, with remainder in default of appointment to the heirs of his body. The suit was by his assignee to compel him to execute the power. Held, by Lord Eldon, that equity cannot compel the execution of the power. The learned chancellor, it is true, says that the question whether the power passed by operation of law to the assignee was not before him, but he refers to the opinion imputed to Lord King in such terms as to show that he approves it. Sir Edward Sugden says, in his work on Powers (vol. 1, p. 225), that upon a bill filed by the assignees against the purchaser in this same case, the Vice Chancellor was of opinion that the power did not pass to the assignee. He cites *Thorpe v. Frere* (N. C., M. T., 1819), but I have not been able to find the case reported.

These decisions doubtless led to the enactment of 6th Geo. IV., 16, 5, 77. This statute provides that "all powers vested

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in any bankrupt, which may be legally executed for his own benefit (except the right of nomination to any vacant ecclesiastical benefice), may be executed by the assignees for the benefit of creditors in such manner as the bankrupt might have executed the same." A provision substantially the same has, I believe, been incorporated into every Bankrupt Act which has been passed in England since the date of the above statute, but no similar provision is to be found in our statute, and I must conclude that it was omitted *ex industria*. It certainly cannot be inferred that the draftsman of our statute was unfamiliar with this provision. It may be found in both of the English Bankrupt Acts of 1861 and 1869. And we know that many of the provisions in our original and amended acts were copied from these statutes.

But whether it was omitted intentionally or not may not be material. Our statute certainly contains no such provision, and it is impossible to construe it as passing to the assignee anything which the English statutes enacted prior to 6 Geo. IV. were held not to pass.

As the power reserved by the son in his settlements might be exercised for his own benefit, it is clear that if he was a bankrupt in England his assignee, in virtue of the recent statutes there, might exercise the power for the benefit of his creditors; but as we have no such statute here, as a power is neither real nor personal property, nor an estate of any kind, it is equally clear that this power did not pass to his assignee.

I have no doubt that, in respect to the property which does pass under our statute to the assignee, all the power and dominion which the bankrupt had over it before his bankruptcy likewise passes. Nor have I any doubt that the bankrupt, in virtue of the general provisions of the statute, as well as in virtue of the express terms of section 5050, may be required to execute any instruments, deeds and writings which may be proper to enable the assignee to possess himself fully of the assets; but it is only in respect to the assets of the bankrupt which have passed to the assignee that he can be required to execute any instruments, deeds or writings. He cannot be re-

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quired to execute a mere power, since a power is not assets or property, or embraced among the things and rights which the statute declares shall pass to the assignee.

But complainant's counsel insist that the justices of the Supreme Court have given construction to our statute to the effect that it does embrace powers to dispose of or charge property. In proof of this they refer to Schedule B, which forms part of every bankrupt's petition, and which schedule was prescribed by the justices under authority of law (Section 4490).

It is true that the caption of Schedule B implies that the petitioner shall include therein "property in reversion, remainder or expectancy, including property held in trust for the petitioner, or subject to any power or right to dispose of or charge." It is also true that the directions in the body of that schedule seem to contemplate that the petitioner shall *mention* all "rights and powers wherein I (he), or any other person or persons in trust for me (him), or for my (his) benefit have any power to dispose of, charge or exercise."

No one more readily than I would submit to a decision of the Supreme Court; but I cannot regard this schedule, though nominally prescribed by its justices, as a decision of the Court. The judges cannot in this way give an authoritative construction to the statutes.

Besides, the schedule does not purport to be a construction of the statute, nor does it necessarily imply that all the rights enumerated in it will pass to the assignee in bankruptcy. It is true it would seem idle to insert in the schedule anything in which the assignee could have no interest, but the petitioner cannot be allowed to judge whether or not a given right or interest will pass to his assignee, and to include or exclude it from his schedule at pleasure. His assignee should be fully informed respecting his estate. He is entitled to have, and should have, all the information which the bankrupt himself has.

This may suggest some explanation of the requisitions contemplated by the form prescribed in the schedule. Certainly the form, in terms, contemplates that the schedule shall include a mere naked power to dispose of or charge property in which

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the bankrupt never had any interest, and which he could not dispose of or charge for his own benefit. Surely no one would be so bold as to contend that such a power passes in bankruptcy; yet, in my opinion, in view of the decisions in England before referred to, construing Bankruptcy Acts containing more comprehensive terms than ours, in view of the legislation there declaring that powers which a bankrupt may exercise for his own benefit shall pass to his assignee in bankruptcy, in view of the terms of our statute and its omissions, there is scarcely more ground for the contention that a power which may be exercised by the donee for his own benefit passes to the assignee, either in virtue of the assignment to him or of the adjudication in bankruptcy, than a power which must be exercised by the donee for the benefit of a stranger.

Let an order be entered dismissing the bill with costs.

UNITED STATES DISTRICT COURT—N. D. NEW YORK.

Prior to the filing of the petition, certain creditors had delivered to the sheriff an execution against the bankrupts. Before the return day of the execution the assignee in bankruptcy took possession of the bankrupt's property, and the creditors, before such return day, proved their claim as secured by a lien by virtue of the delivery of the execution to the sheriff. No actual levy under the execution was made. *Held*, That the creditors had a valid lien which followed the property into the hands of the assignee; that such lien did not cease to exist until the return day of the execution, and that, as it existed when the claim was proved, a failure to make an actual levy before the return day did not extinguish it.

In re MILES W. STOCKWELL et al.

THE facts appear fully in the opinion.

WALLACE, J.—The claimants having delivered an execution against the bankrupts to the Sheriff of Niagara County, prior to the filing of the petition in bankruptcy, and the sheriff having failed to make an actual levy, now ask that the assignee pay the amount of the execution out of the funds in his hands, he having taken possession of the bankrupt's property before

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the return day of the execution, and the claimants before such return day having proved the claim as secured by a lien by virtue of the delivery of the execution to the sheriff.

At the time the claimants proved their judgment, they had a valid lien upon the bankrupt's property. That lien was acquired by the delivery of the execution to the sheriff, and an actual levy was not essential to its existence as against an assignee in bankruptcy. The claimants had two remedies; they could have directed the property to be seized under a levy and sold to satisfy their lien, or they had the right to prove the claim as a secured debt. If they had taken the former course they might have been restrained by this court, upon the application of the assignee; if they had not been so restrained they would have been regular and protected. They were not bound to pursue the property and take it from the possession of the assignee, and they adopted the more seemly course of acquiescing in the assignee's action in taking possession of the property and of treating their claim as one which the assignee should satisfy out of the proceeds of the property. The assignee sold the property, and sufficient funds arose to pay the lien.

The assignee now contends that, inasmuch as an actual levy was not made before the return day of the execution, the lien ceased to exist; and such is doubtless the law. (*Smith v. Smith*, 60 N. Y., 161; *Hathaway v. Howell*, 54 N. Y., 97.) But it did not cease to exist until the return day. It existed when the claim was proved. The claimants have not lost this lien because they elected to prove their claim. If it existed when they proved, this court will recognize and enforce it, and will not hear the assignee complain because they did not proceed to seize the property and take it from his possession.

This case is similar in its facts to *In re Weeks* (4 N. B. R., 364), where the same conclusion was reached as here.

Ordered that the assignee pay the amount of claimant's execution with interest.

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COURT OF APPEALS—NEW YORK.

JANUARY 15, 1878.

The amendment of 1874 to Section 1 of the Bankrupt Act of 1867 did not confer or take away jurisdiction of the State Courts; its only effect is to allow the Federal Courts to decline to entertain actions at common law, to which the assignee is a party, in which the debt demanded is less than the amount which determines the jurisdiction of these courts in other cases.

A suit brought by an assignee in bankruptcy, to collect a debt due to the bankrupt, is not a matter or proceeding within the meaning of Section 711 of the Revised Statutes.

HENRY P. KIDDER, Assignee, &c., of CHARLES H. GLYN, respondent, v. WILLIAM T. HORRABIN et al., appellants.

THE facts appear fully in the opinion.

S. Hand, for appellants.

A. J. Parker, for respondent.

ANDREWS, J.—This action is brought by the plaintiff, as assignee in bankruptcy of one Charles H. Glyn, against the indorser and acceptor of a draft drawn May 18, 1875, by F. A. Leigh & Co., and which came to the hands of the plaintiff as part of the assets of the bankrupt. The point is now taken, for the first time, that the State Courts have no jurisdiction of an action by an assignee in bankruptcy to recover a debt owing to the bankrupt.

It is conceded that prior to 1874 State Courts had concurrent jurisdiction with the Federal Courts in actions by assignees in bankruptcy, and cases arising under the Bankrupt Act. This is conclusively settled by adjudication both in the Federal and State Courts. (*Clafin v. Houseman*, 15 N. B. R., 49, 93 U. S., 130; *Cook v. Whipple*, 9 N. B. R., 155, 55 N. Y., 150.)

It is now accepted as the general rule upon the subject, that State Courts have concurrent jurisdiction with the Federal Courts in cases arising under the Constitution, laws or treaties

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of the United States, unless excluded by express provision, or from the nature of the particular case. (1 Kent, 397; *Ward v. Jenkins*, 10 Met., 583; *Clafin v. Houseman*, *supra*.)

By Section 1 of the Bankrupt Act, as originally enacted, March 2, 1867, the District Courts of the United States were constituted Courts of Bankruptcy, with original jurisdiction, in their respective districts, in all matters and proceedings in bankruptcy, and with authority to hear and adjudicate upon the same according to the provisions of the Act. The Section declares that the jurisdiction shall extend to certain enumerated cases, among others "to the collection of all the assets of the bankrupt." In construing this section it has been held, that as jurisdiction in bankruptcy was statutory, it was necessarily exclusive in the courts which were designated as Courts of Bankruptcy and vested with jurisdiction in bankrupt proceedings by the Bankrupt Act. But it was also held, that the declaration in the same section, that the jurisdiction of the District Courts should extend to the collection of the assets of the bankrupt, did not exclude the jurisdiction of the State Courts in actions by the assignee to recover the assets of the bankrupt. The same construction was given to a similar provision in the Bankrupt Act of 1841. (*Ex parte Christy*, 3 How. (U. S.), 292; *Nugent v. Boyd*, *id.*, 426; *Ward v. Jenkins*, 10 Met., 583.) The first Section of the Bankrupt Act was amended by the Act of Congress approved June 22, 1874, by adding thereto this proviso: "Provided that the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt, as contradistinguished from equitable demands, shall, when such debt does not exceed five hundred dollars, be collected in the courts of the State where such bankrupt resides having jurisdiction of the claims of such nature and amount." It is claimed by the defendant that this proviso is to be construed as conferring upon the State Courts jurisdiction of actions for the collection of the debts and assets of the bankrupt, directed by the Bankrupt Court to be brought in the State Courts, and by implication to exclude jurisdiction in all other cases.

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We, however, concur in the view expressed by the Supreme Court of Massachusetts, in *Goodrich v. Wilson* (14 N. B. R., 555, 119 Mass., 429), that the effect of the amendment is not to confer or take away jurisdiction of the State Court, but simply to allow the Federal Courts to decline to entertain actions at common law, to which the assignee is a party, in which the debt demanded is less than the amount which determines the jurisdiction of these courts in other cases.

It is also claimed that the State Courts are deprived of jurisdiction of actions by assignees in bankruptcy, to recover debts due to the bankrupt, by Section 711 of the Revised Statutes of the United States, which declares that the jurisdiction vested in the courts of the United States in the cases and proceedings mentioned in the section, shall be exclusive of the courts of the several States. . This declaration is followed by a specification of eight classes of cases, of which the sixth is "of all matters and proceedings in bankruptcy." The argument is that a suit brought by an assignee in bankruptcy to collect a debt due to the bankrupt is a matter and proceeding in bankruptcy, and that the jurisdiction of the State Courts is therefore excluded.

We do not think that a suit brought for this purpose is a matter or proceeding in bankruptcy within the meaning of Section 711. It is to be noticed that six of the eight classes of cases mentioned in the section are mentioned also in the Judiciary Act of 1789, and jurisdiction therein is by that Act vested exclusively in the Federal Courts. The fifth specification in Section 711 is "cases arising under the patent right or copyright laws," and it had been held before this section was passed that it was the intention of the patent laws to confer on the Federal Courts exclusive jurisdiction in cases arising under them. This was the construction given to these Acts by the courts. (*Dudley v. Mayhew*, 3 Coms., 9; *Cook v. Whipple*, *supra*; *Clafin v. Houseman*, *supra*.)

It will be seen, therefore, that as to seven of the eight classes of cases specified in Section 711, that section is a mere codification of the law as it stood when the section was passed. If

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the construction of the language of the sixth specification insisted upon by the defendants prevails, we must conclude that Congress intended, in respect to the class of cases therein mentioned, to depart from the general purpose of the section, and to make a radical change in the prior policy of the law.

We think this was not the intention of Congress, and that a construction which would oust the State Courts of jurisdiction of common law actions, in cases where an assignee in bankruptcy is a party, is not admissible. It may be difficult to make a complete definition of what are matters and proceedings in bankruptcy, within Section 711, but we think it may be stated, in general terms, that they are the matters and proceedings which pertain to the special and peculiar jurisdiction of the Federal Courts, as courts of bankruptcy. The adjudication of the bankruptcy; the appointment of assignees and other agents for the administration of the system; the vesting of the title to the bankrupt's property in the assignee; the marshaling and distribution of the assets; the discharge of the bankrupt from his debts; these and other like powers belong to the jurisdiction in bankruptcy, and are matters and proceedings in bankruptcy of which State Courts have no jurisdiction. But when a common law action is an appropriate remedy to enforce a right asserted by an assignee in bankruptcy, whether the right is given by the Bankrupt Act, or existed in favor of the bankrupt before the bankruptcy, an action to enforce or vindicate the right is not, we think, a matter or proceeding in bankruptcy within Section 711. The exercise of the original and ordinary jurisdiction of the State Courts in such cases is in no proper sense an exercise of jurisdiction in bankruptcy. The fact that the plaintiff makes his title under the Bankrupt Act by assignment from the debtor, or by force or operation of the Act itself, does not make the suit a matter or proceeding in bankruptcy any more than would a suit brought by an assignee appointed under the State insolvent law, to recover a debt owing to the insolvent, be a proceeding or matter in insolvency.

We think it is quite clear that the State Courts are not deprived of jurisdiction of actions by assignees to collect the

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assets of the bankrupt by the section referred to. If this was the intention of Congress, it is reasonable to suppose that it would have been explicitly declared, and an intention to deprive State Courts of jurisdiction will not be inferred from doubtful language, nor will the words of a statute be extended beyond their strict meaning to accomplish this result.

Section 4972 of the Revised Statutes does not, we think, aid the defendant. It is simply a re-enactment of that part of the first Section of the Act of 1867, which declares to what matters the jurisdiction of the District Court shall extend. We conclude, therefore, that the objection to the jurisdiction in this case is not well taken.

The defendants are concluded from the defense based upon the use made by Page, Richardson & Co., as agents of Robert Benson & Co., of the bills of lading and of the proceeds of the property embraced therein, by the settlement made by them of the suit brought in the United States Court to recover on their guaranty of the credit given by Benson & Co. to Leigh & Co.

If the defendants were prejudiced by the course of dealing by Page, Richardson & Co. with the bills of lading, or the application of the proceeds, it was a matter which might properly have been urged and determined in that action. If their liability as sureties was discharged in whole or *pro tanto* by the acts of Page, Richardson & Co., it was a matter of defense, and the defendants should have taken their ground at that time. But they preferred to settle the claim and gave their paper for the whole amount of the advances made on the letter of credit. Upon the paper being given, the bill in the suit was discharged and the bond canceled. There was upon the facts found no duress, or any fraud, concealment, or misrepresentation on the part of Robert Benson & Co., or their agents, in respect to the settlement. The defendants knew that the bills of lading had been delivered by Page, Richardson & Co. to F. A. Leigh & Co., and that F. A. Leigh & Co. had received the property. They did not know that the proceeds had been paid to Page, Richardson & Co., or that they had been applied on another account. But they made no inquiry, and they were put upon inquiry

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by the fact which they did know, that Page, Richardson & Co. had parted with the bills of lading. Under these circumstances the defendants cannot resist the payment of the drafts in question upon the facts growing out of the original transaction. That matter was concluded by the settlement, and no fraud or mistake is shown which within the cases would authorize the matter to be reopened. (*Russell v. Cook*, 3 Hill, 504; *Stewart v. Ahrenfeldt*, 4 Denio, 189; *Farmer v. Walter*, 2 Ed. Ch., 601; *Crans v. Hunter*, 28 N. Y., 389.)

The possession of the draft by Glyn, the plaintiff's assignee, was presumptive evidence of his ownership, and this presumption was not rebutted by the evidence on the trial.

Glyn was one of the firm of Robert Benson & Co., upon whose claim the draft was given, and was therefore part owner of the draft when it was given. The paper is produced in court by the assignee of Glyn, and this *prima facie* establishes the plaintiff's title.

The referee could not, as matter of law, have held that the note did not belong to Glyn, and the question of fact is found for the plaintiff.

We think there was no error committed on the trial, and that the judgment should be affirmed.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

The District Court has jurisdiction of a controversy as to the ownership of a fund in the hands, or under the control of the assignee in bankruptcy, 13 *et. d. N.* 389
without regard to the residence of the parties in interest, 8 *et. R.* 50

Where it appears that a suit to determine adverse claims as to the ownership of a fund in the hands of the Bankrupt Court is pending, the court will detain such fund until the rights of the parties thereto have been determined in such suit.

In re PHILO R. SABIN.

On the petition of James Armstrong and others, for the surrender to them of a dividend check, payable to their order.

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The petition set forth that petitioners were residents of the State of New York, and trustees of Edward W. Bancroft, for the benefit of his creditors, under an assignment bearing date December 29th, 1873; that on the ninth day of April, 1875, Scott, Lathrop and Hermance, predecessors of the petitioners, as trustees of the estate of the said Bancroft, proved a claim against the estate of the said bankrupt, in the sum of sixty-six thousand nine hundred and ninety-five dollars and ninety-eight cents, and that the same was allowed by the register, and placed upon the list of debts; that on the twenty-first day of May, 1875, a dividend was declared in the sum of five thousand eight hundred and twenty dollars and seventy cents, and a check therefor, payable to the order of said Scott, Lathrop and Hermance, as such trustees, was drawn by the assignee, countersigned by the register, and should have been delivered to them; that the assignee refuses to deliver said check to the petitioners, and improperly and wrongfully withholds the same, notwithstanding the request of petitioners to deliver it to them; that neither Scott, Lathrop, nor Hermance, nor the petitioners, have ever received this check, or the money represented thereby, but have forbidden the American National Bank from paying the same without their indorsement; that they have been subrogated to all the rights of the former trustees by an order made by the register, and are entitled to the said check and money represented thereby, and prayed that the said check may be declared null and void, and a new check be issued by the assignee to the petitioners.

The answer of the assignee alleged the filing of a bill in equity by Thomas Cochran and William Barbour, as complainants, against Scott, Lathrop and Hermance and Bancroft, the petitioners, and the assignee as defendants. That said bill sets forth the filing of the proof of debt, February 9, 1874, by said Bancroft, against the estate of said Sabin, for a claim of one hundred and seventy-two thousand three hundred and two dollars and seven cents. That on February 11, 1874, there was filed proof of another debt by Bancroft, in the sum of seventy-two thousand sixty-two dollars and fifty-eight cents,

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which last claim was derived by Bancroft by an assignment to him of the same from Peake, Opdyke & Co., of New York. That on November 28, 1873, in consideration of twenty-five thousand dollars paid him by Charles H. and George C. Scofield, Bancroft assigned to them any and all dividends which might be declared by the assignee, upon any claims which he had against the estate of said Sabin, or which might become payable to him by said assignee. That by said assignment, the amount which Scofield & Co. were to receive hereunder, was limited to twenty-five thousand dollars. That owing to defects in the first proof of debt filed by Bancroft, in failing to give proper credits for certain securities received by him, the said proof of debt was withdrawn, by order of the court, and leave granted to file an amended proof, and in accordance with such permission, Scofield & Co. caused a proof of debt to be perfected in the name of Scott, Lathrop and Hermance, trustees of Bancroft, for the seventy-five thousand seven hundred and fifty-two dollars which Scofield & Co. caused to be filed on April 9, 1875, in place of the one first above mentioned. That after the commencement of proceedings in bankruptcy, Bancroft became embarrassed and made a general assignment to Scott, Lathrop and Hermance; but inasmuch as the assignment to Scofield & Co. of Bancroft's claims against the estate was not an assignment of the demands themselves, but only of the right to receive dividends to a certain amount, Scofield & Co. could not formally make proof of the debt in their own name, but were obliged to have the same made in the name of the party having the legal title thereto; wherefore they did, at their own cost and charges, procure the above named amended proof to be filed. That in certain litigation over said claims, and the proof and allowance thereof, Scofield & Co. also paid out counsel fees, etc. That on June 1, 1875, a dividend was declared, and by means of a power of attorney executed by Bancroft prior to his assignment, Scofield & Co. received the dividend then payable on said claim derived from Peake, Opdyke & Co.; but as to the amount claimed for them by the trustees of Bancroft, the assignee drew a check for a dividend,

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payable to the order of said trustees, and delivered the same to the attorney of Scofield & Co., which was forwarded to them, and has been in their hands until their assignment to Cochran, McLean & Co., and in the latter's hands since that time. That the dividends on the claims have not paid thirteen thousand dollars, the amount remaining due. That afterwards the trustees resigned, and the petitioners in this matter were appointed in their place, and both sets of trustees have refused to indorse said check. That Scofield & Co. assigned their right to the same to Cochran, McLean & Co., who have since dissolved, and Cochran & Barbour have succeeded to their rights. That the bill prays that the dividend may be decreed to belong to the complainants. That neither Bancroft nor his trustees have any right to the dividends, except such as may be declared in excess of the twenty-five thousand dollars, and that Cochran & Barbour alone have the right to collect the same.

The assignee further alleges that the bill proceeds to pray for relief, and for a decree adjudging the dividend to the complainants, and that the check may be indorsed and delivered to them. He also avers generally his belief that the allegations of the bill are true, and that the complainants are entitled to the check; that in obedience to the order of the Bankrupt Court, made May 28, 1875, he delivered to Don M. Dickinson, Esq., representing Cochran, McLean & Co., a check for the amount of the dividend. He further avers that he is advised that the petitioners have entered their appearance in the chancery suit above mentioned, and that in delivering the check to said Dickinson, he acted in entire good faith, and in accordance with what he supposed and believed to be the truth upon the facts made known to him; that said chancery suit is now pending and undetermined, and an effort, as he is advised, will be had thereunder for a plenary hearing of the entire subject-matter, and that a more satisfactory determination can be had than in a summary proceeding of this character.

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That he believes the petitioners have no interest in the check aforesaid, or in the dividends which they represent.

Henry M. Duffield, for petitioners.

Don M. Dickinson, contra.

BROWN, J.—This is a conflict between rival claimants to a fund still practically in the hands, or under the control of the assignee of Sabin, the petitioners being the trustees of Bancroft under a general assignment for the benefit of creditors, and the respondents, standing in the position of the assignee of such claim to the amount of twenty-five thousand dollars, by a special assignment made before the general assignment to petitioners.

This, in brief, is the relative position of these parties, and the question is whether the court will order the dividend paid over to the trustees of Bancroft under the general assignment, as holding the legal title thereto, or will detain it until the right of Cochran & Barbour to the same can be determined in the chancery suit, commenced by them against the assignee and the petitioners.

This, of course, involves incidentally the jurisdiction of the District Court, in equity, of a bill filed by citizens of New York, as complainants, against the assignee of Sabin and the petitioners, who are also citizens of New York, as defendants.

Whenever a contest arises with regard to the ownership of a fund in court, the practice of the English Court of Chancery is to make what is termed a "stop order" to detain the fund in favor of assignees or creditors, or other persons entitled thereto, as against any party to the suit, and, in case the right to the same is in dispute, to make such order operative until a bill can be filed to settle the right to the same.

The practice is thus stated by Mr. Daniel (3 Daniel's Chancery Practice, 1797): "Any person, although not a party to the cause or proceeding in which the fund in court is standing, who has become entitled to any such fund, or to any share thereof, or to any lien or charge thereon, may apply to that

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branch of the court to which the cause or proceeding is attached, for an order to prevent the fund in question being paid out or otherwise dealt with, without notice to the applicant."

Instances of such applications are not infrequent in the reports. (*Hobson v. Shearwood*, 8 Beav., 486; *Williams v. Symonds*, 9 Beav., 523; *Thorndike v. Hunt*, 3 DeG. & J., 563; *Wells v. Gibbs*, 22 Beav., 204; *Bethune v. Kennedy*, 3 Beav., 462.)

The case of *Feistel v. Kings College* (11 Beav., 254), bears a strong resemblance to the one under consideration.

Feistel becoming entitled, by assignment, to a certain claim, filed a bill, obtained a fund in court and a decree for payment. Before payment to him under the decree, the assignees of one Lyon Samuel, a bankrupt, came into court and claimed that a part of the fund equitably belonged to the bankrupt, by an agreement made in 1844, and asked for an account to be taken. It was contended "that strangers to the cause had no right to intervene. That this was an attempt to alter the decree by petition, and that a stop order was not usually granted after the rights had been declared by decree." But the Chancellor observed:

"I quite agree that the decree cannot be altered upon petition, but here there is no attempt whatever to find fault with the decree. The case is simply this: there is a decree for payment to A B, who has assessed, or holds it in trust for C D. C D says: 'Do not part with the fund until I have an opportunity of taking proceedings to establish my right.' I think that a court has authority to do this, and has frequently exercised it."

It was ordered that the fund be not paid out, and that applicant file a bill to enforce his demand within ten days.

In *Stuart v. Cockerell* (L. R., 8 Eq., 607), the question arose between assignees in bankruptcy and an assignee of a dividend in court. The court entertained the application of the assignee of the dividend. (See also, *In re Brown's Trusts*, L. R., 5 Eq., 88; *Lister v. Tidd*, L. R., 4 Eq., 462.)

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In *Thorndike v. Hunt* (3 DeG. and J., 563), Head Justice Turner held that the application to the court should be by a bill, when parties claim adversely.

I see no reason to doubt that Cochran and Barbour have pursued the proper practice, in this regard, and that a stop order should be made, provided the court has jurisdiction of the bill filed by them against the assignee and petitioners.

Aside from the question of citizenship, I find no difficulty in supporting the jurisdiction of the District Court in this case.

By Section 4972 the jurisdiction of the District Courts as Courts of Bankruptcy extends,

3d. To the ascertainment and liquidation of liens, and other specific claims upon the assets of the bankrupt.

4th. "To the adjustment of the various priorities and conflicting interests of all parties."

5th. "To the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties, and due distribution of the assets among all the creditors."

6th. "To all acts, matters and things to be done under, and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy."

More comprehensive language could scarcely be used to confer upon the District Courts jurisdiction of all controversies of whatsoever name and nature, connected with the winding up and distribution of the estate of bankrupts. (*Buckingham v. McLean*, 3 McLean, 185.) It is true the jurisdiction under this section is usually exercised in a summary manner; but I know of no objection to proceeding in any case by plenary suit, particularly where there are parties making adverse claims to any portion of the bankrupt's estate.

It is admitted that if this were an original suit, this court would not have jurisdiction, by reason of the parties in interest being citizens of the same State. The bill can only be supported upon the theory that it is auxiliary to the proceedings in the Bankrupt Court, and that cognizance of the case is necessary to prevent a failure of justice. I find no case directly in point,

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though there are a large number holding the general principle that when the new suit naturally grows out of, and is connected with the former one, jurisdiction may be entertained regardless of citizenship. For instance, if a judgment at law be recovered in the Circuit Court, the defendant may file a bill to enjoin the judgment against the representative of the original plaintiff, though he be a citizen of the same State as the defendant. (*Dunn v. Clarke*, 8 Pet., 1; *Dunlap v. Stetson*, 4 Mason, 349; *St. Luke's Hospital v. Barclay*, 3 Blatch., 259.)

So a creditor's bill, a cross-bill, and a bill of review, are simply continuations of the original suit, and may be sustained between citizens of the same State. (*Hatch v. Dorr*, 4 McLean, 112; *Whyte v. Gibbes*, 20 How., 541; *Railroad Companies v. M'Chamberlain*, 6 Wall., 748.)

In *Freeman v. Howe*, a State Court attempted to replevy from the marshal property seized by him upon a writ of attachment. The proceeding was held to be unauthorized, and the Supreme Court remarked by way of dictum, that the plaintiff in replevin might have obtained relief in a Federal Court, even if both parties were citizens of the same State. Such jurisdiction was actually exercised by the Circuit Court of Massachusetts, in *Gibbs v. Usher* (1 Holmes, 348), when a bill was filed to restrain the use of the process of the court by the marshal, in a manner contrary to law.

In the *Minn. Company v. The St. Paul Company* (2 Wall., 609), it is said that when a bill in equity is necessary to have a construction of the orders, decrees, and acts made or done by a Federal Court, the bill is properly filed in such Federal Court, as distinguished from any State Court, and it may be entertained in such Federal Court, even though the parties who are interested in having the construction made, would not, from want of proper citizenship, be entitled to proceed by original bill of any kind in a court of the United States.

If the property be in the hands of the Receiver of the Circuit Court "nothing can be plainer than any litigation for its possession must take place in that court, without regard to the citizenship of the parties."

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The dictum in the case of *Freeman v. Howe* was subsequently quoted with approval in *Buck v. Colbath* (3 Wall., 334).

That a judgment of this court may be stayed, or impeached for fraud, by a bill in equity filed for that purpose, regardless of citizenship, was also declared in *O'Brien v. Brown* (1 Dill., 588), and in *St. Luke's Hospital v. Barclay* (3 Blatch., 259).

In *Givin v. Bradlove* (2 How., 29), the marshal failed to pay over to a judgment creditor the money collected upon an execution. It was held, Mr. Justice Daniel dissenting, that the marshal might be proceeded against by the creditor, notwithstanding both parties were citizens of Mississippi.

In *Jones v. Andrews* (10 Wall., 327), a leading case, it was held, that a bill for an injunction to restrain proceedings in garnishment against the plaintiff's property, which proceedings had been instituted in the Circuit Court, and also praying the benefit of set-offs against the garnishing creditor's demand, was not an original suit, but a defensive and supplemental suit, in which the jurisdiction of the court did not depend upon the citizenship of the party, but upon the cognizance of the original case.

In the *Bank v. Turnbull* (6 Wall., 190), the sheriff of a State Court had levied an execution upon property claimed to belong to citizens of other States; an issue was made in the State Court to determine the title of the property, and before trial the plaintiffs in such issue removed the cause to the Circuit Court of the United States. The Supreme Court held the action to be merely auxiliary to the original action, and therefore not properly removed. (See also, *Davis v. Gray*, 16 Wall., 203; *Sutherland v. Lake Superior Ship Canal and Railroad Company*, 9 N. B. R., 298, 307, 311.)

In *Kellogg v. Russell* (11 N. B. R., 121), the marshal, acting as messenger of the District Court in Bankruptcy, seized certain property supposed to belong to the bankrupt, and transferred it to the assignee. A suit was brought in the State Court against the marshal for such seizure, by the party who claimed the property. It was held that the marshal and the

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assignee might bring suit in the Circuit Court against the claimant and the bankrupt to set aside the transfer as fraudulent, notwithstanding the fact that the property was in possession of the assignee at the time the suit was brought, and that an injunction could be issued to restrain the further prosecution of the suit in the State Court.

The principle underlying these cases is thus admirably stated by Judge MacDonald, of the District Court of Indiana, in *Conwell v. The Whitewater Valley Canal Company* (4 Biss, 195):

“In a cause over which a national court has acquired jurisdiction solely by reason of the citizenship of the parties, if the rights and interests of third persons should become complicated with the litigation, either as to the original judgment, or any property in the custody of the court, or any abuse or misapplication of its process, and if no State Court has power to guard and determine those rights and interests without a conflict of authority with the national court, the latter court will, from the necessity of the case, and to prevent a failure of justice, give such third persons a hearing, irrespective of their citizenship, so far as to protect their rights and interests relating to such judgment or property, and as to correct any abuse or misapplication of its process, and no further.”

I cannot see that the case of *Paine v. Caldwell* (6 N. B. R., 558) has any bearing upon the one under consideration. In that case it was held that an assignee in bankruptcy, appointed by the District Court of Maine, had no power to bring an action in that court against a citizen of Massachusetts, to recover a fraudulent preference obtained by him in the Supreme Court of Maine, which was paid within four months preceding the commencement of bankrupt proceedings. Service of the subpoena was made on the attorneys who acted for the defendant in obtaining this judgment, and it was argued that the respondent, having resorted to and availed himself of the courts of Maine to obtain this fraudulent judgment, continued subject to the authority of the courts of that State, including the District Court in Bankruptcy, and could not withdraw from

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the State with the fruits of his judgment, without remaining amenable to the courts in any ulterior proceedings arising from his original suit; but as the defendant had never become a party to the bankruptcy proceedings, the court denied its jurisdiction.

There can be no doubt of the correctness of this opinion.

So in *Christmas v. Russell* (14 Wall., 69), the bill was dismissed on the ground that it was an original proceeding, and therefore not cognizable in the Federal Court. (See also, *Markson v. Heany*, 4 N. B. R., 510.)

The case under consideration grows directly out of a dispute as to the ownership of a fund in the hands of the Bankrupt Court. The defendants, the original trustees of Mr. Bancroft, having proved their debts, remain subject to the jurisdiction of this court without regard to their place of residence. (*In re Kyler*, 2 Ben., 414; *Phelps v. Sellick*, 8 N. B. R., 390; *Watson v. Citizens' Savings Bank*, 11 N. B. R., 161.)

I am not bound to anticipate that the subpoena may not be served upon them; indeed it strikes me now as a proper case for substituted service on their attorneys. I regard the suit as auxiliary to the original proceedings in bankruptcy, and that the court has jurisdiction of the case.

The claim that the complainants in this bill have a complete and adequate remedy at law was touched upon at the argument of this motion, but I prefer to consider it when formally raised upon demurrer to the bill. As at present advised, I am unwilling to say that a suit at law in a court of another State is as complete a remedy as the detention of the fund here. (*Boyce v. Grundy*, 3 Pet., 210; *Watson v. Sutherland*, 5 Wall., 74; *Bunce v. Gallagher*, 5 Blatch., 481; *U. S. v. Meyers*, 2 Brock., 516; *Hunt v. Danforth*, 2 Curt., 592.)

The petition must be denied.

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COURT OF APPEALS—NEW YORK.

OCTOBER 2, 1877.

An inadvertent mistake in the amount of a debt, made by a bankrupt in the schedule filed in composition proceedings, will not avoid the composition as to any creditor.

It matters not to what time interest on a debt is computed, provided the interest on all the debts is computed to the same time.

The provision of the Bankrupt Law in relation to the correction of inadvertent mistakes in the schedule has reference to material mistakes, as the omission of some debt, or of the name of some creditor.

CLEMENT E. BEEBE, appellant, v. CYRUS PYLE, respondent.

THIS was an action upon a judgment in favor of the plaintiff against the defendant. The defendant, who was indebted to the plaintiff, having been adjudged a bankrupt, made a proposition of composition which was accepted and duly recorded. He subsequently tendered to plaintiff the sum of two hundred and sixty-six dollars, being the percentage, not of the amount stated to be due him in the schedule filed in the composition proceedings, but of a judgment subsequently recovered on the claim with interest to the date of tender. In this action the defendant claimed that the judgment and the debt on which it was based have been extinguished by the composition proceedings. The plaintiff claimed that in the schedule furnished by the defendant in such proceedings, the amount of his claim was understated, and that therefore such proceedings were invalid as to him.

J. T. Marean, for appellant.

J. D. Taylor, for respondent.

EARL, J.—Section 17 of the Act of Congress of June 22, 1874, amending the Bankrupt Laws, provides for a composition of a bankrupt with his creditors. A meeting of the creditors may be called under the direction of the court, and they may resolve that a composition proposed by the debtor shall be accepted in satisfaction of the debts due to them. The debtor

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is required to produce to such meeting a statement showing the whole of his assets and debts, and the names and addresses of his creditors. The resolution of the creditors and such statement of the debtor must be presented to the court, and the court shall, upon notice to all the creditors and upon hearing, inquire whether such resolution has been properly passed, and if satisfied, as specified in the Act, it shall cause the resolution to be recorded and the statement to be filed, and the composition when perfected "shall be binding on all the creditors whose names and addresses and the amounts of the debts due to whom are shown in the statement," but shall not affect or prejudice the rights of any other creditors.

Under the provisions of this Act the defendant made a composition with his creditors which he claims and the court below held to be a bar to any recovery in this action. The only objection the plaintiff makes to the validity of the composition as affecting his claim is that in the statement presented to the meeting of his creditors the defendant understated the amount of the claim.

There is nothing to show that the alleged understatement was for any fraudulent purpose, and we must assume that if in fact there was such understatement, it was by mistake or inadvertence. It may well be doubted whether there was such understatement. At the meeting of the creditors the debtor makes his own proposition. He names the sum he is willing to pay as a computation with his creditors, and makes a statement of the debts upon which he offers to pay.

It is important that the debts should be stated with substantial accuracy, but it matters not to what time the interest on the debts is computed, provided the interest on all the debts be computed to the same time.

He may compute the interest on the debts to the time of filing the petition against him in bankruptcy, and offer to pay a percentage upon the amount of debts thus shown, or he may take any later date for the computation of interest, and so far as I can perceive there would be a substantial compliance with the law, and no injustice would be done to any creditor.

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Here the amount stated to be due the plaintiff was one thousand two hundred and seven dollars and forty-three cents, which was more than the amount actually due him, as subsequently established by the verdict of a jury, at the time of filing the petition. It does not appear that the statement produced at the meeting of the creditors included in the debts shown any interest subsequent to the filing of the petition, and hence no injustice was done, or error committed, of which plaintiff can complain.

But an inadvertent mistake in the amount of the debt would not, in my opinion, avoid the composition as to any creditor. The debtor and all his creditors whose names and debts appear in the statement, and who are properly served with notice, are parties to the proceedings in the Bankrupt Court. Such creditors have the right to appear and be heard, and if the amount of any debt is not accurately stated, it must be corrected in that court, which has ample power at all times to make corrections and to relieve against inadvertent mistakes. It must frequently be the case that a debtor having numerous creditors will be unable to state accurately the accounts due to them. His debts may be unliquidated or in dispute, and the time from which interest should be computed may be uncertain. The provision as to composition would in many cases fail of its beneficent purpose if in such cases the debtor is required to state the amount of his debts with absolute accuracy at the peril of losing the benefit of his composition.

It is true that the law requires that he shall produce to the meeting of his creditors a statement of his debts, and that it provides also that the composition shall be binding on all the creditors whose names and address and "the amounts of the debts due to whom are shown in the statement."

But it is *his* statement of the debts, as he believes them to exist, which the law requires, and all that can be exacted of him is that he make it as accurate as, in good faith, he can, and the composition is binding upon the creditors, the amounts of whose debts are thus stated.

It is provided in the law that "any mistakes made inad-

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vertently by a debtor, in the statement of his debts, may be corrected upon reasonable notice with the consent of a general meeting of his creditors." The mistake here meant is some material mistake, as the entire omission of some debt or of the name of some creditor. It cannot be supposed that it was intended that there should be a formal meeting of the creditors for the purpose of correcting a mistake of a few dollars or a few cents in the amount of some debt.

I am therefore of opinion that the composition was binding upon the plaintiff, and that the judgment should be affirmed.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

MAY 30, 1878.

- A petitioning creditor will not be permitted to withdraw where the rights of his co-petitioners will be injured thereby.
- A misrepresentation on the part of one of the debtors, by means of which a creditor was induced to join in the petition, will not entitle such creditor to withdraw, especially where such misrepresentation was not as to any matter of substance, nor intentionally false.
- A creditor who has obtained an attachment after the filing of the petition and the issue of the order to show cause has no right to intervene and oppose an adjudication.

In re HENRY C. VOGEL and THOMAS A. REYNOLDS.

THE facts sufficiently appear in the opinion.

Walsh & Eckerson, for petitioning creditors.
Nelson Smith, for the moving parties.

CHOATE, J.—One of the creditors who joined in the petition against the debtors now moves for leave to withdraw on two grounds; first, on what his counsel calls the natural right of every plaintiff to discontinue his suit, and secondly, on the ground that he joined in the petition at the request of the

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debtors themselves, and was induced to do so by a misrepresentation on their part as to the nature of the claims of two of his co-petitioners.

It appears that since the filing of the petition the creditor now moving to withdraw has obtained judgment on his debt. The motion must be denied. There is no analogy between this case and a suit at law or in equity where a plaintiff may discontinue on payment of costs, because he thereby affects injuriously no interests but his own.

The right does not exist where the defendants' rights would be impaired, as in case of a counter claim, which would be barred by the statute of limitations if the discontinuance were allowed. (*Van Allen v. Schermerhorn*, 14 How. Pr., 287.)

In this proceeding the other petitioners have rights to be protected. They have relied upon the joinder of this party with them, as enabling them to maintain the petition. It may well be that if he had not joined they might have obtained another co-petitioner to take his place.

If he withdraws the petition may fail, and the intervening rights of other parties may deprive them of the benefit of this proceeding. Therefore, the general right of a petitioner to withdraw without sufficient cause cannot be admitted; to allow it would put all these proceedings at the mercy of the caprice or self-interest of any petitioner who may be persuaded or bribed to discontinue. The fact alleged that the petition was filed by collusion with the debtors, and was in fact their petition, is not available to the petitioner. Such proceedings are valid though instituted with the consent of the debtors and by their assistance, and the petitioner will not be heard to say that his petition was not filed in good faith so far as he is concerned. There was not on the proofs any misrepresentation which induced the moving petitioner to join that entitles him, as against his co-petitioners, to withdraw.

If they had induced him by deceit to join he might be allowed to withdraw. (*In re Heffron*, 10 N. B. R., 213.) But the alleged deceit was on the part of one of the debtors, and it does not appear upon the affidavits to have been a mis-

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representation as to any matter of substance, nor intentionally false.

Another creditor of the alleged bankrupts, who, since the filing of the petition, has obtained an attachment on the property of the debtor and a judgment, his debt being provable in bankruptcy, now moves on the ground of the lien he claims to have acquired to be allowed to intervene and contest the right of the petitioner to have an adjudication.

This motion must also be denied. The Bankrupt Law provides (Section 5024) that upon the filing of the petition and the issue of the order to show cause thereon, "The Court may also by injunction restrain the debtor *and any other person* in the meantime from making any transfer or disposition of any part of the debtor's property not excepted by this Title from the operation thereof and from any interference therewith."

I think it is the obvious meaning and purpose of the statute that after the filing of the petition, and after the court shall in the first instance have determined that the proofs are sufficient to authorize the issue of the order to show cause, all interference with the property of the debtors on the part of other persons shall cease, and to carry out this policy and prevent vexatious attempts to obtain the property this power to enjoin is expressly given.

If, however, by reason of the fact that the petitioning creditors were ignorant of the pending proceedings of other creditors or otherwise such other creditors do interfere with the property and attempt to get an advantage for themselves by attachment or levy of execution, the fact that they were not enjoined will not as against the petitioning creditors give them any rights whatever.

Under such attachment or levy their proceedings, so far as they are an interference with the debtor's property, are in violation of the statute, and void.

In this case the moving creditor, after the filing of the petition and the issue of the order to show cause, proceeded with a suit then pending, and obtained a warrant of attach-

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ment, under which goods of the debtor were seized by the sheriff, and he has since got judgment.

He is not in the position of a creditor who at the time of the filing of the petition has a lien by attachment which would be avoided if the petition is sustained, and who is on that ground held to be entitled to contest the right of the petitioners to maintain the petition.

On the contrary, he is simply in the position of a creditor at large, who, it has been repeatedly held, has no right to intervene.

UNITED STATES DISTRICT COURT—N. D. OHIO.

In order to carry out more fully the objects of its organization, the Denison University, in 1865, proceeded to raise an endowment fund of one hundred thousand dollars, and the bankrupt subscribed two thousand dollars thereto. In the following year, the University having succeeded after great expense in raising the full amount of such fund, the bankrupt gave his note in satisfaction of his subscription. He subsequently subscribed five hundred dollars toward erecting a new building for the University, and paid one hundred dollars thereon. The building was erected on the faith of this and other subscriptions. Shortly after this second subscription the bankrupt executed and delivered to the University a note, secured by mortgage, for seven thousand and five hundred dollars, the amount being made up of the amount of his former note, the balance due on the second subscription and money borrowed of the University. In a proceeding by the assignee to settle and declare the amount and priority of liens and for a sale of the bankrupt's property, a supplementary petition was filed asking that so much of the University's claim as was made up of the voluntary gifts of the bankrupt be set aside. *Held*, That the claim was valid, that if it was founded upon the original subscriptions it would be good; but in this case the original subscriptions had been settled, satisfied, and paid by the notes, and that after such changes and settlements every presumption is in favor of the transaction, and the court will not go behind it.

STEPHEN B. STURGIS, Assignee, etc., of HUBBARD COLBY, v. HUBBARD COLBY, THE DENISON UNIVERSITY, et al.

THE facts appear fully in the opinion.

WELKER, J.—This was a proceeding by the assignee to settle and have declared the liens of the different lien-holders on the

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bankrupt's estate, and the amount and priority of such liens, and for a sale of the property.

The Denison University was made a party defendant, and called upon to answer and state the amount of its claim and the nature thereof. To this the University answered, setting forth its claim and mortgage to secure the same, as hereinafter stated.

After the coming in of this answer, the plaintiff filed a supplemental petition, setting forth that a portion of the debt secured to the University was a gift voluntarily made by Colby while insolvent, and should be set aside as to creditors, it being a *subscription* to the University endowment fund.

To this supplemental petition the University *answered* :

1. Denying the charge of insolvency.
2. If the facts stated in the supplemental petition were true as to the insolvency, the consideration of so much of the University claims as are founded on subscriptions to its funds, as in its answers set forth, the consideration was sufficient and valid.

The character of the subscriptions will appear in the subsequent statements in this opinion.

By the answers of the University it is seen that disclosures are called for both by the original and supplemental bills. These answers being responsive to the requirements called for by the petition, no testimony is needed to sustain the answers. It will be seen that to set aside a portion of the University's claim the supplemental petition alleges that, ever since 1864, Colby has been insolvent. This is denied, and it is denied that he was insolvent in January, 1872, or before that time. The answer to the supplemental petition then states in substance that in the fore part of the year 1865 the University, through its agents, to carry out more fully the objects of its organization, proceeded to raise an endowment fund of one hundred thousand dollars, and Colby subscribed two thousand dollars; and at great expense said University proceeded until the full sum of one hundred thousand dollars was subscribed and raised. That said Colby examined said subscriptions and fund raised,

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and *found* and agreed with this defendant (University), and represented to and agreed with the other subscribers to said fund that said one hundred thousand dollars had been raised. And therefore said Colby, *in satisfaction* of his subscription, in November, 1866, gave his note for two thousand dollars, dated November 1, 1866, at two years, with interest annually from November 1, 1866. Said Colby induced others to settle their subscriptions to said fund.

Said two thousand dollar note was taken in payment of said Colby's subscription. That, in consequence of said subscriptions, greatly increased expenses and extension of facilities have been entered upon by said University.

That in January, 1872, the University was in need of a new building and sought subscriptions for it, and Colby subscribed five hundred dollars—paid one hundred dollars. The building was built on the strength and faith of this and other subscriptions.

That March 27, 1872, Colby made a loan of said University of seven thousand and five hundred dollars, part of said endowment fund, and gave the mortgage set out and attached to the answer to the original bill. Of this seven thousand five hundred dollars, the sum of two thousand and fifty-two dollars was for amount due on said note of two thousand dollars given in settlement and satisfaction of said original subscription; and four hundred dollars was for the second subscription, being the one of five hundred dollars. The balance to make said seven thousand five hundred dollar loan was advanced in cash, being five thousand and forty-eight dollars.

Both of said subscriptions were in manner aforesaid satisfied, *settled*, and discharged.

The facts of the case being as before stated, we will proceed and see what the law as applicable to this state of facts is.

In Ohio it is the policy of the law to promote and favor the interests of education.

In *Ohio Female College v. Love's Ex.* (16 Ohio St., 27), Judge Scott, in giving the opinion of the court, says: "It has at all times been the declared policy of this State to favor and

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promote the interests of education and the general diffusion of knowledge among the people. To this fact the provisions of the Constitution itself, our system of School Laws and Acts providing for the incorporation of institutions of learning bear ample testimony."

On page 28, the court further says:

"This subscription then was authorized by law. It was evidently intended by the maker that the managing officers of the corporation should rely upon it as a part of the means and resources of the institution. It was but reasonable that they should rely upon the solemn pledge thus given, and incur liabilities upon the faith of it. And that such liabilities were in fact incurred, the petition distinctly avers."

The question here raised is not a new question in Courts of Bankruptcy.

It was before the United States Court in and for the District of Delaware, and was decided about the year 1875, in the case of *Capelle v. Trinity M. E. Church*, (11 N. B. R., 536).

The following is the syllabus of the case:

"A claim was proved by a church corporation, founded upon a verbal promise by a bankrupt to M. that he (the bankrupt) would pay eight hundred dollars, if M. would subscribe a portion of the indebtedness due from the church to M., the promise being subsequently publicly announced in the church in the presence of the congregation. It appeared by the proof that the expenses had been incurred by the trustees of the church upon the faith of the subscriptions generally, though not that any definite expenditure was made on the faith of this particular subscription.

"*Held*, That the promise was founded on a *good legal consideration* upon two alternative grounds. It was one of two *mutual* promises for the benefit of the church, each being the *consideration* of the other, and the claim provable by the *beneficiary*; and, *secondly*, as a promise to the church, partly upon which expenses were incurred, it would sustain an *action of assumpsit*, and might be proved in bankruptcy."

(See also, *Amherst Academy v. Cows*, 6 Pick., 427, par-

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ticularly as to consideration and burden of proof, notes being given.)

The case of *Farmers' College v. Executors of McMicken* (2 Disney, 495) is another Ohio authority supporting the claim of the University.

In this case it is distinctly *held*:

"1st. A gratuitous subscription, to pay certain moneys toward a particular stated fund to be raised for the endowment of certain professorships in a college, becomes a fixed legal obligation as soon as the college has performed its undertaking and raised the required amount of reliable subscriptions.

"2d. Such subscriptions to the college to do an act, if the college will perform a prescribed duty on its part, if accepted, the contract is complete."

In *Williams College v. Danforth* (12 Pick., 541) it is held more strongly than in the *Farmers' College* case, if possible; and is the case of a college, and in substance is like the endowment subscriptions for Denison University.

We will cite no more authorities, but will say, in conclusion, that if the claim of the University was founded upon the original subscriptions, it would be good according to the authorities.

But in this case, the University's claim is well fortified. If there was ever any doubt, that is obviated by the fact that the original subscription was settled, satisfied, and paid by note of two thousand dollars ten years ago. Then that note was settled by a new note given on this loan.

The five hundred dollar subscription was also settled by note being given, and entering into this seven thousand five hundred dollar loan.

After such changes and settlements, every presumption is in favor of the transaction, and the court will not go behind it. (See 6 Pick., 431.)

Let a decree be entered for the amount of the mortgage of the Denison University.

Louchheim Brothers v. Henzey.

SUPREME COURT—PENNSYLVANIA.

MAY 6, 1878.

A debtor's passive non-resistance to an action is not necessarily a fraud on the Bankrupt Act, although he may be insolvent in contemplation of that act.

The mere fact that the debtor brought or caused goods to be brought within reach of the execution a short time before the sheriff's sale, which was closely followed by the commencement of proceedings in bankruptcy against him, is not sufficient under the Bankrupt Act to invalidate the sale.

Where a sale has been made under two judgments it is not invalidated by the fact that the debtor, with a desire to prefer either plaintiff, failed to make a defence which by law he was entitled to make.

LOUCHHEIM BROTHERS v. HENZEY, Administrator.

THIS was an action of trespass for the illegal seizure of goods, brought originally by plaintiffs against United States Marshal Gregory.

At the trial it appeared that H. S. Louchheim, individually, and the firm of Louchheim Brothers, in December, 1869, each brought suit against Nathan Kahn, the former upon a promissory note, the latter upon a book-account for money loaned. Judgments for want of affidavits of defense were obtained in these cases for three thousand six hundred and seventy-seven dollars and eighty-three cents and two thousand six hundred and seventy-five dollars and thirty cents respectively on December 27, 1869, though no affidavit of the loan was filed in the case of the Louchheim Brothers. Execution was issued on these judgments. Kahn's stock of goods was levied on and sold by the sheriff, and was bought by the plaintiffs for five hundred and sixty-seven dollars and fifty-eight cents, who employed Kahn's son to carry on the business for them. H. S. Louchheim was Kahn's son-in-law, but there was evidence that they were not on good terms. It appeared that in November, 1869, Kahn had brought on certain of his goods from Ohio to Philadelphia, where some of them were accidentally burned and the remainder

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transferred to his store, where they were sold by the sheriff among the goods previously mentioned.

On January 7, 1870, other creditors of Kahn filed a petition in involuntary bankruptcy against him, and on January 25th he was adjudged a bankrupt. These creditors then required the United States Marshal Gregory to seize the goods at Kahn's store. This he did, and he delivered the goods to the assignee, who sold them for one thousand eight hundred and fifty-three dollars and seventy cents. This action was then brought against the marshal, who died before the trial, whereupon his name was replaced on the record by that of his administrator.

The judge directed the jury that if the plaintiffs were the active parties in procuring a preference by judgments and executions, knowing or having reason to know that Kahn was insolvent, the preference was in fraud of the Bankrupt Law, and as against it no title passed by the sheriff's sale. Verdict and judgment for the defendant. The Supreme Court reversed this judgment, and ordered a new trial.

At the second trial the defendant requested the Court to charge, *inter alia* : If the jury believe that Nathan Kahn, with a desire to prefer Louchheim Brothers or Henry S. Louchheim, failed to make a defence to the plaintiffs' suit which by law he was entitled to make, *or* caused goods to be brought within the reach of the executions, then there was sufficient under the Bankrupt Act to invalidate the whole transaction. *Answer* : This point is affirmed; with the qualification that the jury must be satisfied from the evidence of such desire and such acts.

Verdict and judgment for the defendant. The plaintiffs took this writ, assigning the answer to the above point for error.

Geo. L. Crawford, for the plaintiffs in error.

A preference is not necessarily a fraud. (*In re John Rorden*, 14 N. B. R., 332.)

That the Bankrupt Act should invalidate a preference, the

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debtor must have done some positive act, not merely have omitted to act, with a desire and intention to prefer. (*Wright v. Filley*, 4 N. B. R., 611, 1 Dillon, 171; *Wilson v. City Bank*, 9 N. B. R., 97, 17 Wallace, 473; *Clark v. Iselin*, 11 N. B. R., 337, 21 Wallace, 360; *Kemmerer v. Tool*, 12 N. B. R., 334, 28 P. F. Smith, 147.)

S. Dickson and Bullitt & Diehl, for defendants in error.

When this case was here before, judgment was reversed on the ground that the question of fraud and collusion on the part of Kahn should have gone to the jury. At the last trial this question was in effect left to the jury, who found the fact of fraud in finding for the defendant. The judge's direction was entirely in accordance with *Wilson v. The Bank, supra*.

MERCUR, J.—This was an action of trespass brought by the plaintiffs in error for the wrongful taking and selling of their personal property. They claimed title to the same through a purchase made at sheriff's sale on the 5th of January, 1870, as the property of one Nathan Kahn. Two days after the sheriff's sale, a creditor of Kahn filed a petition in bankruptcy against him, and on the 25th of January, 1870, he was adjudged a bankrupt. The defendant, who was the United States Marshal, seized and sold the same property by virtue of the proceedings in bankruptcy. The rights of the parties depend on the effect to be given to the sheriff's sale.

The plaintiff in error relies on the third assignment only. This covers the answer of the court to the fifth point submitted by the defendant. The court charged that if the jury was satisfied from the evidence that Kahn, with a desire to prefer the plaintiff, in either of the judgments on which the sale was made, failed to make a defence to the plaintiffs' suit which by law he was entitled to make, or caused goods to be brought within the reach of the executions, then there was sufficient under the Bankrupt Act to invalidate the whole transaction and the sheriff's sale, and the verdict must be for the defendant. When this case was here before (27 P. F. Smith, 305), it was

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held that the proceedings under the judgments and executions were not, *per se*, in fraud of the Bankrupt Law, but were questions of fact for the jury. This fifth point presents two distinct propositions stated disjunctively, each of which was affirmed. Neither one presents the question of Kahn's intending to defraud any of his creditors, nor of any collusion of the plaintiffs in the judgment with him; but in effect the answer declares that either of the facts stated constitutes an implied fraud on the Bankrupt Law. The sale was made by virtue of executions issued on two judgments, yet the jury was told if Kahn, with a desire to prefer either plaintiff, failed to make a defence to the plaintiffs' suit which by law he was entitled to make, they should find for the defendant. The failure to make defence in either one "invalidated the whole transaction." As a legal proposition we think this is not correct. In contemplation of law, each judgment stands on its own merits. The fact that one of the plaintiffs was interested in both judgments, does not change the rule of law as to their separate effect, although it may increase the probability as to the facts alleged. It is not clear to our mind exactly what idea the court intended to convey to the jury when he refers to the defence which by law Kahn was entitled to make. It appears the judgments were taken for want of affidavits of defence. Did the court mean that if Kahn had no other defence than one purely technical, he was bound to interpose it; or was it intended to limit the requirements to defending against a debt not honestly and justly due? If the debt was justly due, I know of no law requiring him to actively resist a recovery. His passive non-resistance is not necessarily a fraud on the Bankrupt Law, although he may be insolvent in contemplation of that Act. (*Wilson v. City Bank*, 9 N. B. R., 97, 17 Wallace, 473; *Sleek v. Turner*, 10 N. B. R., 580, 26 P. F. Smith, 142; *Kemmerer v. Tool*, 12 N. B. R., 334, 28 P. F. Smith, 147.)

The other objectionable part of the answer is, "or caused goods to be brought within the reach of the execution" is "sufficient to invalidate the whole transaction of the sheriff's sale." Thus this one act is by itself alone declared to be suffi-

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cient to taint and corrupt the whole transaction. The validity of the debts may have been unquestionable. The judgments may have been recovered in undoubted good faith. The executions may have issued with the most pure intentions. Kahn may not only have honestly owed the debts, but may have been under the highest legal and moral obligation to pay them, yet, according to this answer, if he "caused goods to be brought" within reach of the executions, it invalidated all the plaintiffs' rights in the property purchased at sheriff's sale. He need not have caused all the goods sold by the sheriff, nor all taken by the defendant, "to be brought within reach of the execution," but any part of them, to vitiate the whole sale.

It is an important fact in this case that the sheriff's sale was made before any proceedings in bankruptcy were instituted against Kahn. The mere existence on the statute book of the Bankrupt Law did not prevent a levy and sale.

If neither the judgments nor the sales were fraudulent in fact, the latter gave a good title to the purchaser. In that case the assignee in bankruptcy could not follow the property, but must resort to the fund produced by the sale. (*Rohrer's Appeal*, 12 P. F. Smith, 498.)

Judgment reversed, and *venire facias de novo* awarded.

UNITED STATES DISTRICT COURT—E. D. NEW YORK.

APRIL 23, 1878.

Where a resolution of composition has been adopted and confirmed by the requisite number of creditors, the right of a creditor to examine the bankrupt under Section 5086 is suspended.

In re ALANSON H. TIFT.

A. C. Aubery, for bankrupt.

C. H. Phelps, for creditor.

BENEDICT, J.—This is an application on behalf of a creditor who has proved a debt for an examination of the bankrupt in pursuance of the provisions of Section 5086.

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On the part of the bankrupt the application is opposed upon the ground that composition proceedings have been instituted and have progressed as far as the second hearing, the resolution of composition having been adopted and confirmed by the requisite number of the creditors.

I am of the opinion that the pendency of the composition proceedings in their present condition is sufficient to suspend the creditor's right to examine the bankrupt by virtue of Section 5086. If the composition proceedings terminate in a valid composition, any examination of the bankrupt now had would avail nothing. If the composition fails, the examination of the bankrupt can be had with equal effect as if now had.

The application must therefore be denied.

UNITED STATES DISTRICT COURT—E. D. PENNSYLVANIA.

In the ordinary case of a solvent private corporation, there is no liability of the stockholders to pay the capital until an assessment, but in the case of insolvency, payment is compellable at the suit of the creditors, though no assessment may have been made.

Under proceedings in equity for this purpose, the court may, if a sufficient corporate organization continues to subsist, order an assessment by the corporate authorities upon the stockholders in any stage of the proceedings for any purpose for which it may be thought convenient. In such case it is only a proceeding in aid of the judicial recourse of the creditors; it may promote the enforcement, but is not essential to the existence of the obligation of the stockholders.

The bankrupt was a manufacturing company organized under a special act with a capital of fifty thousand dollars, divided into one thousand shares of fifty dollars each, with power to increase the number of shares to three thousand. The act prescribed no form or method of subscription to the stock, but authorized the payment of subscriptions in real or personal estate appropriate to the corporate business at a bona fide cash valuation, to be agreed upon by a majority in interest of the subscribers and stockholders. It gave no authority to the Directors or to any officer to accept payment for the stock except in money or money's worth. By the articles of association it was provided that the capital stock should be one hundred and forty thousand dollars, divided into two thousand eight hundred shares of fifty dollars each, and that the subscribers should give their notes, without interest, for the amounts subscribed by them respectively, which notes should not be liable, at any time, to an assessment for more than fifty per cent. of their face, nor to an assessment of more than twenty per cent. within eighteen months from the organization of the company. *Held*, That the true, legal, and only rational meaning of

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the provision was that, with ultimate relation to creditors, the capital was of the full residuary amount of one hundred and forty thousand dollars, but such calls for payments on the stock as might from time to time be made by the corporate authorities, in the course of the active business of the company, as a solvent concern, should not exceed one-half of that amount. There was nothing, therefore, in the articles of association to exempt or absolve stockholders from liability to creditors for so much of the whole capital of one hundred and forty thousand dollars as might be required for the payment of the debts.

Notes were given by most of the stockholders in payment for the stock subscribed for by them. Each of these notes conformed to the provisions of the articles of association, but contained a provision that all dividends should be credited proportionately upon it until its full amount, by reason of credits by assessments and dividends, should be paid, when the same should be returned and in lieu thereof a paid-up certificate of stock be issued. *Held*, that the operation of the articles of association as to creditors was not and could not be altered by the insertion of this provision in the notes.

The company having become bankrupt, and the deficiency of other assets exceeding the whole unpaid amount of the capital of one hundred and forty thousand dollars, *Held*, That the stockholders were liable to the assignee in bankruptcy for their respective proportions of such unpaid amount.

Stockholders of an insolvent corporation who are also creditors, cannot be allowed to deduct the amount due to them from their respective proportions of the unpaid capital; but if they prove their debts under the bankruptcy, deductions equal to their estimated respective dividends may perhaps be made from the amounts of the assignee's demands against them as stockholders.

Where an investment in stock by a corporation was *ultra vires* the corporation will not be held liable as a stockholder.

A transferee of stock in a bankrupt company is liable to the assignee in bankruptcy in respect to such stock; but where the transfer was not accepted by the transferee, the transferer alone is liable.

WILBUR, Assignee, etc., of the Glen Iron Works, v. THE STOCKHOLDERS OF THE CORPORATION.

THE facts fully appear in the opinion.

W. D. Luckenbach and H. Green, for the creditors.

P. K. Erdman, C. M. Runk, and R. E. Wright & Son, for stockholders.

CADWALADER, J.—The Supreme Court has described the capital of a private incorporated company as a fund publicly pledged to all who deal with the association. (22 How., 387.) The application of the remark was to relations of the stockholders of such a company to its creditors. The stockholders

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individually are not liable for its debts in any sum greater than their proportional amounts of the capital; and this limitation fortifies the reason that the creditors should be assured of an available recourse for so much of the capital as may be required for payment of the debts. Therefore a deceptive existence of a nominal or illusory capital, as distinguished from an actual and available one, cannot be sanctioned.

The capital is a fund clothed with a trust for the security of the debts. (Story Eq. Jur., Section 1252, cited 15 How., 307.) So much of the capital as the stockholders have paid in is administered by the corporation; and if misapplied, or not rightly applied, the stockholders, unless willful participants in the wrong, are not responsible for it, or for any losses of creditors which it may cause. But even this immunity of the stockholders does not extend to capital paid in which has afterwards been paid back to them. They can, as against creditors, retain only the accrued profits, which, as contradistinguished from capital, have been actually earned and fairly distributed before insolvency. Capital paid back may, in the case of corporate insolvency, be followed by the creditors in the hands of the stockholders. (3 Mason, 308; 15 Howard, 307, 308.)

The questions in the present case concern capital never paid in. The obligations, express or implied, of the stockholders to pay such capital are held by the corporation in trust for the ultimate security of its debts. (1 Otto, 45, 56, 66, 70, 71.)

Where the corporation is solvent, the unpaid capital is not due and payable by the stockholders until payment in part or in whole is called for by the corporate authorities, unless a postponement of the payment would be inconsistent with some provision of the act of incorporation, or with a conventional engagement with the stockholders. Ordinarily, there is no such inconsistency of either kind, and thus, in the case of a solvent corporation, a call or levy by the corporate authorities, assessing the amount or amounts payable, must ordinarily precede any ascertained obligation of the respective stockholders to pay.

But in the contrary case of an *insolvent* corporation, the recourse of its creditors does not depend upon any such condi-

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tion precedent, and cannot be thus postponed. Every stockholder is, with relation to creditors, under an obligation to pay so much of the amount represented by his share, or shares, of the capital, as may be required for payment of the corporate debts. Where he has made no express engagement, this obligation to pay is implied. Where an express engagement has been made upon such a condition as would impair the recourse of creditors, they may proceed as if no such conditional engagement had been made.

Upon the insolvency of the corporation, the obligations of the stockholders thus at once become assets for the payment of its debts to such extent as other assets are deficient. To this extent the obligation of every stockholder, in its just proportion, then becomes in equity a debt payable for the benefit of the creditors. No act of the corporation, before or after its insolvency, can derogate, in this respect, from the rights of creditors.

Neither can any *omission* of the corporation, or of the corporate authorities, exempt or absolve stockholders from this obligation. For example, there may not have been any call, or assessment of the contributory amounts of unpaid capital; or, where an assessment has been formally made, the corporation may not have taken measures, by suit, or otherwise, to compel defaulting stockholders to pay. Such omissions do not affect the equitable right of the creditors to payment.

But there is no direct privity between them and the stockholders. The creditors therefore cannot, in their own names, sue the stockholders in a court of law, and may be unable, in such a court, by mandamus or otherwise, to compel a private corporation either to make an assessment, or to institute suits to enforce one if made. (See 1 Q. B., 288.)

But however such omissions may thus, for technical reasons, impede redress at law, they do not prevent or impede the available and complete recourse of the creditors in equity.

In a suit in equity by the creditors against the stockholders of an insolvent corporation to compel them to contribute a sufficient amount of unpaid capital to make good the deficiency

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of other assets, the corporation must of course be a party defendant. Such a suit is maintainable under several heads of equitable jurisdiction. The jurisdiction is exercisable in aid of the equitable rights of the creditors, who would otherwise have no adequate redress at law. It is also exercisable in order to enforce the due execution of the franchise of the corporation under the trust with which the capital is clothed for payment of the debts. The proceeding has been described by the Supreme Court as in the nature of an attachment in which the stockholders are called in to answer as garnishees. (22 How., 387.) But in order to avoid circuitry, the proceeding is also, on equitable principles, considered as a suit directly against the stockholders. They are thus, by the same court, assimilated in such a case to the special partners of a limited partnership. (Ibid.) This analogy implies that the stockholders become debtors through the mere insolvency of the corporation.

In such a suit a receiver is ordinarily appointed. The amount of the deficiency, and amounts of the contributory quotas, may be ascertained by proofs, or through a reference and master's report, according to the course of procedure in equity; and there may thus be a final decree, affording adequate relief to the creditors, without any assessment by the corporate authorities. (22 How., 380; 3 Comst., 415, 423; 13 Wis., 57.)

If a sufficient corporate organization continues to subsist, an assessment by the corporate authorities upon the stockholders may be ordered by the court of equity in any stage of the proceedings for any purpose for which it may be thought convenient. But in such cases the assessment, so called, is different in its nature from the assessments by a solvent corporation. The consideration of this difference in the applications of the word *assessment* will become very important hereafter. In the meantime it may be observed that in the case of an insolvent corporation, the assessment, if judicially ordered, is only a proceeding in aid of the judicial recourse of the creditors. It may promote the enforcement, but is not essential to the existence, of the obligation of the stockholders. Thus Judge Treat

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was of opinion that where "a company is insolvent, the original mode of making calls upon the stockholders is not to be pursued in the enforcement of" the equitable right. He said, "The debt is then due on demand." (10 N. B. R., 412, 413.) In a previous case in Ohio the language used was that where a company "becoming insolvent abandon all action under their charter, the original mode of making calls upon their stockholders cannot be pursued. The debt, therefore, from that time must be treated as due *without further demand*." (17 Ohio, 191.) This case was cited by the Supreme Court of the United States in 1 Otto, 60, 61. In these three cases, the comments on the subject were very much alike, to the effect that "no stockholder could shelter himself behind an agreement that he might pay otherwise than in money or money value," and that if, as between the corporation and the stockholders, there might be an agreement to pay in some other medium, "neither directors, nor stockholders, nor both," could so act towards creditors as to debar them from insisting upon actual payment in money.

More than two centuries ago, a decision of the House of Lords, on an appeal from the Court of Chancery, established the competency of equitable jurisdiction under a creditor's bill against an insolvent trading corporation and the stockholders; and established the existence of an incidental judicial power to direct the levying of an assessment by the corporate authorities upon the stockholders. But, in the same case, the ultimate decision indicated that there was no necessity for such an assessment where the bill was taken as confessed, or the debt and contributory amounts were otherwise ascertained. The suit was in equity only. There was neither a previous, nor a subsequent action at law. The Court of Chancery, on a demurrer by the stockholders, decreed that the bill be dismissed. The Court of Appeal reversed this decree, overruled the demurrer, and remitted the cause to the Court of Chancery with a provisional order for an assessment. But, as the defendants did not appear and answer, the bill was taken *pro confesso*; and the assessment does not appear to have been thought necessary.

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It probably never was made. The ultimate decree was a direct one that the defendants pay what was due. (*Salmon v. The Hamburg Company*, 1 Ca. Ch., 204, 208, abridged in 6 Viner, 310, 311, and cited by the Supreme Court in 1 Otto, 61.)

In many cases of corporations adjudged bankrupt under the recent Bankrupt Law of the United States, the Court of Bankruptcy has made such an assessment. It is, to the extent of the unpaid capital, binding upon the stockholders, who may afterwards be severally sued at law by the assignee for the respective contributory quotas. This course of proceeding by the assignee, though circuitous, and sometimes requiring a multiplicity of suits, has been thought more convenient, in most cases, than a bill in equity, or a summary suit of that nature in bankruptcy against the stockholders, because, in such a proceeding, they must all be defendants. But where they can all be conveniently served with process, whether it be a subpoena in equity, or a citation in bankruptcy, this objection does not apply; and the Supreme Court has said that "the assignee might have filed a bill against all the delinquent shareholders." (1 Otto, 62.)

Where the capital is of a certain amount, to which it was either originally limited, or has been increased by an unconditional exercise of competent authority, the propositions above stated as to rights and remedies of creditors apply without exception or qualification. Therefore, if an optional increase of unpaid capital has been effected unconditionally, the corporation or corporate authorities cannot *afterwards*, with relation to creditors, by any act or omission, exonerate the stockholders from their obligation to pay the increased amount, or, in any wise qualify the obligation. This was, in effect, decided in *Chubb v. Upton* (16 N. B. R., 537, 5 Otto, 665.)

A question which may here be suggested is, whether, *at the time* of an authorized increase of unpaid capital, a condition which could not *afterwards* be imposed may not, under possible circumstances, be reasonably annexed to such increase by the same competent authority which creates it. Effectual

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arrangements of this kind may be conventionally made between the stockholders and the corporation, or by the stockholders mutually with one another. But arrangements thus valid and binding in those relations might be invalid with relation to creditors. The point is whether such a condition can be valid in any case with relation to creditors. This question cannot arise except as to some part of the capital of which the creation is wholly optional with the corporation. Nor can the proposition be affirmed unless with a limited application regulated so as to preclude any possibility that creditors may be misled by a fictitious or illusory increase of the capital. Under this restriction, and perhaps others, the proposition may, in the abstract, be affirmed. The respondents contend that it is applicable in the present case to a certain part of the capital of the bankrupt corporation.

They are the stockholders, and the petitioner is the assignee of this corporation. It was a manufacturing company created by an act of the Legislature of Pennsylvania of the 16th of March, 1865 (Pamph. Laws, p. 387), with a capital stock divided into shares of fifty dollars each, to consist of one thousand shares with power to increase the number of shares to three thousand. The minimum of legislatively authorized capital was thus fifty thousand dollars, and the maximum one hundred and fifty thousand dollars. Any addition to the minimum was optional, but was to be in shares of fifty dollars each. No form or method of subscription of the minimum, or of any increased amount, was prescribed. This legislative omission distinguishes the case from some of those which have been cited in the argument.

The act of incorporation authorized the payment of subscriptions of stock in real or personal estate appropriate to the corporate business, at a *bona fide* cash valuation *to be agreed upon by a majority in interest of the subscribers and stockholders*. This impliedly prohibited payment of the capital otherwise than in money, or money's worth. But though the act had contained nothing on the subject of the medium of payment, contributions to the payment of capital otherwise

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than in money or money's worth could not have been rightfully accepted by the corporation.

The act provided that the affairs of the company should be managed by a board of directors, one of whom should be the president, who should be chosen by the stockholders. But no power was expressly given to the directors, or to any officer, to accept payment of the capital, or of any part of it, otherwise than in money. What might, in this respect, have been the implied administrative power of the directors, if no authority over the subject had been expressly conferred upon the stockholders duly assembled, is a question which it will not become necessary to consider. It may, however, become important hereafter to recollect that the act, as above quoted, expressly required a vote of the stockholders to sanction the acceptance of a payment even in real or personal estate, appropriate to the corporate business; that no power, absolute or qualified, was vested in the directors or officers to accept such a payment; and that they could acquire no such power, unless it were delegated by a vote of the stockholders. Whether it could be thus delegated is a question which will not arise.

The act did not, otherwise than as has been mentioned, prescribe any method of corporate organization, but provided that the first election of the directors and president should be held within sixty days after the act should take effect, and gave the "privilege to commence operations" when five thousand dollars of the capital should be subscribed and paid in. Large powers of borrowing and issuing securities for money borrowed were also conferred. But more than five years elapsed before anything was done, formally, with a view to a commencement of the corporate business. Whether the organization was too late, or was otherwise irregular, are immaterial questions. Objections of this kind cannot be suggested in a proceeding between the present parties. (See *Chubb v. Upton*, 16 N. B. R., 537; 5 Otto, 665; also 1 Peters, 46, 63, 65.)

On the 23d of July, 1870, there was a meeting of the shareholders, who subscribed articles of association, and elected officers and directors. The articles of association were sub-

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scribed by all of the shareholders on that day, or, at the latest before the end of July, 1870.

These articles have been called a subscription list. But this name applies very imperfectly. They constituted, so far as the amount of capital, and the rights of creditors with relation to it, might be concerned, a fundamental conventional organization of the company, which was irrevocable.

The leading provision of these articles of association was, that *the capital should be one hundred and forty thousand dollars, divided into two thousand eight hundred shares of fifty dollars each, and that the subscribers should give their notes, without interest, for the amounts subscribed by them respectively, which notes should not be liable, at any time, to an assessment for more than fifty per cent. of their face, nor to an assessment of more than twenty per cent., within eighteen months after the organization of the company.*

According to this provision of these articles, the company was to have a certain capital, of which one-half was never to be *liable to assessment*. How ought the phrase *liable to assessment*, as here used, to be understood and applied? Did it mean that this half of the capital should not, in any possible event, become payable? If so, the provision was self-contradictory, and absurd, if not fraudulent. It would then import that the capital should be one hundred and forty thousand dollars in two thousand eight hundred shares of fifty dollars each, but that seventy thousand dollars of the amount, or twenty-five dollars of each share, should not become payable even in the event of the company's insolvency, and a failure of other assets. This seventy thousand dollars would not, in that case, be a part of the capital for any purpose whatever, and one thousand four hundred shares would not be shares of fifty dollars each. But no such absurd meaning is attributable. The true legal and only rational meaning of the provision was that, with ultimate relation to creditors, the capital was of the full residuary amount of one hundred and forty thousand dollars, but such calls for payments on the stock as might from time to time be made by the corporate authorities, in the course of

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the active business of the company as a solvent concern, should not exceed one-half of that amount.

The intended application of the provision clearly was to capital *requiring an assessment* in order to make it payable. The difference, in this respect, between a solvent and an insolvent corporation has been explained. We have seen that, as a corporation is solvent or insolvent, the nature, purposes, and effect of what is called an *assessment* differ widely, and that, in the ordinary case of a solvent private corporation, there is no liability of the stockholders to pay the capital until an assessment, but that in the case of insolvency, payment by them is compellable, at the suit of the creditors, though there may not have been any assessment. The provision in question was applicable only to *assessment* in the primary sense of the word. The limitation of *liability to assessment* therefore applied only between the corporation and the stockholders, or to the stockholders among themselves, and did not, in any wise, affect rights of creditors.

That no other intent is rationally imputable appears, also, when we consider that not more than twenty-eight thousand dollars (that is to say, twenty per cent. of the whole conventionally increased capital of one hundred and forty thousand dollars) was, according to this provision of the articles, to be *liable to assessment* for the period of eighteen months. But the minimum amount of legislatively authorized capital was fifty thousand dollars. Therefore, twenty-two thousand dollars of minimum was to be exempt from liability to assessment for this period. Such a conventional postponement of payment might be fair and honest, as between the corporation and the stockholders, or as to the stockholders among themselves. But it could not, even according to the respondent's own theory of the present case, be pretended that this twenty-two thousand dollars, or any other part of the minimum amount of the statutory capital, could be put by them beyond the reach of creditors for eighteen months. Yet this would be the effect of the articles, if the phrase *liable to assessment*, as used in them, were understood as intended to affect creditors in any event.

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For these reasons there was nothing in the articles of association of July, 1870, to exempt or absolve stockholders from liability to creditors for so much of the whole capital of one hundred and forty thousand dollars as might be required for payment of the debts. The stockholders would have been liable for no less an amount if they had severally given their notes in the form stipulated in the same articles, and would, under those articles, have been liable for no less, though no such notes were given.

The question remaining for consideration arises from the fact that notes of stockholders were afterwards given and received which differed materially from such as were stipulated for.

Subjoined to the articles were two parallel columns, opposite to the respective signatures. In one of these columns the number of shares of each stockholder was set down. This column appears to have been filled up in July, 1870, when the articles were subscribed. The other column, headed "Amount of Stock Note given," seems not to have been filled up until afterwards, at the several times when the respective notes were given. But these times are not entered in the column.

No note appears to have been given by any stockholder in July, 1870, when the articles of association were definitely agreed upon and subscribed. At different times, in and after August, 1870, notes, called "stock notes" or "subscription notes," all dated on the first of that month, were signed by forty-two of the shareholders. There were five other shareholders, none of whom gave any note. Every note given was for the full amount of fifty dollars for each share taken by the subscriber, payable one day after date, without interest, and subject to such assessments, from time to time, as the board of directors might deem necessary, provided that such assessments should not exceed fifty per cent. of the face of the note, nor exceed twenty per cent. thereof within eighteen months from its date, and that all assessments made and paid should be credited thereon.

Thus far the notes were substantially conformable to the

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the stipulation for them in the articles. But every note contained the additional provision that *in the event of the company declaring any dividend, or dividends, out of profits made, the same should be credited on the note, in the proportion to which the number of shares of the capital stock standing in the subscriber's name might entitle him, until the full amount of the note, by reason of credits by assessments and dividends, should be paid, when the same should be returned to him, and in lieu thereof a paid-up certificate of stock be issued.*

As to that half of the capital stock of one hundred and forty thousand dollars which was payable in actual money whenever called for, these notes thus repeated the provisions of the articles of association. The provision of those articles, that the other half should not be liable to assessment, was also repeated in words, but with a different context. The superadded provision changed their meaning. The import, thus altered, was, according to the notes, that the latter half of the capital should not be payable otherwise than out of a contingent fund composed of the profits, if there should be any, of the company's future business; and this contingent fund was appropriated for the payment of any capital otherwise deficient. Therefore, no dividends of profits were to be distributable until after such payment, but all profits which might be earned were to be reserved as applicable to such payment, until the whole nominal capital should be accumulated and paid.

If the superadded provision had been contained in the articles of association, or had been stipulated for in them, as an intended provision of the notes which were to be given, the question of the effect of the arrangement, as a whole, with relation to creditors, would have been a very interesting one, however it might be decided. It was contended for the assignee that any appropriation of contingent profits otherwise than for payment of the debts would be fraudulent with relation to creditors. But the answer to this argument is that *actual profits* might, in the absence of any appropriation of them, be distributed as dividends among the stockholders, and therefore an appropriation preventing such a withdrawal of profits

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could not be fraudulent. If, in the result, seventy thousand dollars, actually earned as profits, had been conventionally obtained as capital, it would be difficult to distinguish this from any other mode of payment in money, or money's worth. The common stock of an unincorporated partnership may certainly be increased by a conventional conversion of accrued profits into capital which cannot be drawn out for individual use.

In such a supposable case, whether of a corporate or an unincorporated association, when the profits are already accrued and in hand, the means of payment are no longer contingent. In the present case, however, no profit was ever made or declared as a dividend or otherwise; nor was a certificate of stock, in any form, ever issued. The question concerns a contingent or conditional increase of capital.

The act of incorporation did not absolutely require a capital of more than fifty thousand dollars. Any excess of capital above that amount being optional, might never have been created. The argument for the respondents, therefore, is, that the excess, if created, might have been created either absolutely or upon any reasonable condition or contingency. The seventy thousand dollars, payable in actual money, though one-half only of the conventionally increased capital, was more than the fifty thousand dollars absolutely required by the act. The other half of the conventional capital, it is contended, might reasonably, therefore, be made payable on the contingency that there should be a sufficient amount of actual profits of the company's business.

It will not be necessary to decide the point, because the operation of the articles of association as to creditors was not and could not be altered by the insertion of the superadded provision in the notes. There was nothing in the articles, or in any proceedings of the stockholders, when the articles were subscribed, to indicate that the notes might contain any such additional matter. Even as between the corporation and a stockholder, the insertion of the provision in his note would, without his concurrence, have been an unauthorized interpolation. This will appear when we consider the subject with

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reference to any one of the five stockholders who never gave notes. If he refused to give such a note as the articles of association had stipulated for, he would have been liable to an action at the suit of the corporation for not giving it. (See 4 East, 147; 3 Bos. & Pul., 582.) But if he had offered to subscribe a note conformable to the stipulation in those articles, and the company had refused it, and required a note containing the superadded provision, the action would not have been maintainable.

For payment of one-half of the capital, the purport of the provision was to authorize a withholding and retention of the profits. Assuming that this might originally have been authorized, it would have required the sanction of a vote of the stockholders, duly convened at a corporate meeting. Independently of special provisions of the act of incorporation, such a sanction would have been required on general principles of the law of corporations. Now, the stockholders were never assembled after they had originally subscribed the articles of association in July, 1870; and even if they had been so assembled, they could not, as to creditors, have annulled or varied anything in those articles.

The creditors of a corporation must, indeed, take cognizance of its organization. But the organization was here effected by the articles which ascertained irrevocably the rights of creditors with relation to the capital. The subsequent taking of the notes was a matter of administration, which, if the notes had been conformable to the articles, would have been in aid of the organization, but even then would not have been a part of it.

As the giving of notes was, however, stipulated for in the articles, the stockholders invoke the rule of interpretation that a recital or mention of one writing in another is constructive notice of the contents of the one recited or mentioned. But this rule cannot here apply so as to affect the creditors. In any stipulation for notes in the articles, the intended contents of the notes ought to have been set forth fully. The stipulation here purported to do so. There was therefore nothing in the arti-

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cles to induce a creditor to desire to see the notes, or even to induce him to inquire whether they were given.

Another ordinary rule of interpretation is that where several writings have been executed between the same parties, or those respectively in privity with them, on the same subject or business, the writings are considered as if they together constituted one and the same instrument. It is therefore urged for the respondents that the articles of association and the notes are to be read together, as if the superadded provision of the notes had been contained in the articles.

There is no doubt that the notes should be interpreted with reference to the articles. Thus far the rule applies. But the question is whether it applies conversely, so that the interpretation of the prior articles depended upon the contents of the subsequent notes where they differ.

It is not always essential to the application of the rule that the writings bear the same date, or have been executed at the same instant of time. The rule may apply to any series of acts fairly executed with a common intent. And so far as they are dependent upon one another, a subsequent act may sometimes indicate the meaning of a prior one.

But where the prior act was absolutely or relatively independent of the subsequent one, the rule cannot apply to the former so far as it was independent. Nor can the rule apply so as to sanction a usurpation of authority by the latter act.

Here the notes were dependent upon the articles. But we have seen that there was no converse dependence of the articles upon the notes, and that no existing authority enabled any parties, after the execution of the articles, to affect rights of creditors by such a provision as was interpolated in the notes.

A consideration of less weight, but perhaps not wholly unimportant, is that there does not appear to have been any permanent memorial of the provision in question. The stock ledger stated the amounts, but did not indicate the form or contents of the notes. The only evidence of an arrangement postponing the payment of one-half of the capital until after a sufficient accumulation of profits was in the notes themselves.

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This was fugitive evidence, not only for general reasons, but also because it was expressly provided in each note that the note should be surrendered so soon as paid through the limited assessments and the accumulated profits. A paid-up certificate of stock was then to be substituted. After such hoped for extinction and surrender of the notes, no evidence of the former arrangement would, so far as appears, have been extant among the papers or in the books of the company. This might be unimportant if the taking of the notes had been only a matter of administration between the corporate authorities and the stockholders. But if the provision so concerned the corporate organization as might affect the source and amount of the capital with relation to creditors, more enduring evidence of the arrangement in its original form would probably have existed.

Much of the above reasoning might have been out of place if the conventional corporate organization had not been originally effected through the articles of association subscribed by the same parties who afterwards gave the notes. Had there been no such previous articles, the organization itself might have depended more or less, if not altogether, upon the notes. The reasoning might also have been more or less qualified, if the stipulation for notes in the articles had not described the intended notes with sufficient fulness and particularity, but had, in this respect, been ambiguous or obscure. There is no such difficulty of either kind; and it follows that the rights of the creditors are definable with a sole reference to the act of incorporation and the articles of association, according to which the capital was one hundred and forty thousand dollars, without any diminution with relation to creditors.

On the 28th of July, 1870, after the adoption of the articles of association, and before the date of the notes, the directors met and assessed two instalments of ten per cent. each on the capital stock. One of them was payable on the 1st of September, and the other on the 1st of November, 1870. Both instalments were paid, except that one holder of fifteen shares paid only the first instalment, leaving the second seventy-five dollars unpaid. The amounts paid by all the stockholders were thus,

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together, twenty-seven thousand nine hundred and twenty-five dollars, as on assessments of twenty-eight thousand dollars, and as twenty per cent. of a capital of one hundred and forty thousand dollars.

Beyond these two instalments, together twenty per cent., no part of the capital was ever paid. On the 3d of September, 1874, the directors imposed an additional assessment of thirty per cent., payable by certain instalments. But the resolution imposing it was rescinded on the 1st of December, 1874. At about this time, the business of the company was closed by reason of insolvency, and in the spring of 1875 the company was adjudged bankrupt, owing one hundred and seventy-six thousand four hundred and thirty-four dollars, with available assets to the amount of only four hundred and twenty-nine dollars.

The deficiency, one hundred and seventy-six thousand dollars, was thus much greater than the whole unpaid capital, at whatever amount computable. If the whole capital was one hundred and forty thousand dollars, the amount unpaid was one hundred and twelve thousand and seventy-five dollars. This unpaid amount is demanded by the assignee in bankruptcy, as payable proportionally by the respective stockholders, respondents. They admit that they are liable for their respective proportions of forty-two thousand and seventy-five dollars, which is all that remains unpaid of the minimum amount of legislatively authorized capital. But they dispute their liability for the seventy thousand dollars, which is the excess above that minimum. In the course of this opinion, the objections to their liability have been considered and overruled.

The proceeding is a petition of the nature of a bill in equity, under the summary jurisdiction of the Court of Bankruptcy. All the stockholders are defendants, and all of them have appeared and answered. The case was referred to a register, to take examinations and proofs, and report specially on certain points. His report is, in effect, an assessment of the whole of the unpaid part of the capital of one hundred and forty thousand dollars upon the stockholders, by name, with a statement

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of the respective contributory quotas. This report is confirmed. Its confirmation is an assessment by the Court, so far as it may be necessary. But as the insolvency is admitted to be total and absolute, the decree will be directly against the several stockholders for the respective amounts of their contributory quotas, which are sufficiently ascertained in the register's report. The several amounts admitted to be due will be payable in two months, and the excess in four months. For one-half of the latter amount, there may be a further extension of two months to any respondent who may give sufficient security.

Every party will pay his own costs, those of the assignee to be reimbursed out of the estate in bankruptcy.

Certain cases of individual stockholders require special consideration.

The first is the case of J. W. Wilson, the late president of the bankrupt company. ..

In the articles of association, the stockholders agreed to purchase, for corporate use, the real and personal estate of a former corporation, at a price equal to that former company's debts. This was, I think, a legally authorized purchase. It was effected, and notes of the bankrupt company, for the price, were given to the creditors of the former corporation. At a meeting of the directors of the bankrupt company, on the 5th of September, 1870, it was resolved that Mr. Wilson, the president of this company, endorse extension notes, to be given to those creditors, and that the company would hold him harmless against loss, by reason of those endorsements; and to that end pledged thirty per cent. of the subscription notes to their capital stock. To the amount of eight thousand six hundred and ninety-five dollars and fifty-five cents, the extension notes have never been paid by this company. Whether Mr. Wilson has paid them does not appear. But he has never been indemnified against his endorsement of them, or secured otherwise than by the resolution of the 5th of September, 1870. He is entitled to the benefit of the security, according to its substantial intent. An interlocutory order to this effect was made in an early stage of the proceedings, with liberty to either party to

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move for further directions. It now appears that he is a stockholder of the bankrupt company, on a subscription for five thousand dollars, upon which his unpaid contributory quota is four thousand dollars. His case, unless amicably settled, may be referred to the register, with directions to adjust and state his account as to these matters, and other dependencies with him, if there be any.

As to the Wyoming Coal and Transportation Company, one of the alleged stockholders, the petition of the assignee is dismissed, but without costs. The investment by or on behalf of that company was beyond its corporate powers. The argument for the assignee upon the distinction between executory and executed contracts does not apply to the case, except so far as it may perhaps preclude this Wyoming Company from getting back the amounts of assessments paid, or from proving for them. Under the peculiar circumstances of the case, I do not consider the officer of the same company who made the subscription responsible personally. It was seasonably ratified by that company so far as its powers extended. The petition is also therefore dismissed as to him, but without costs.

The set-offs claimed by certain stockholders who allege that they are creditors of the bankrupt corporation cannot be allowed as deductions from the respective amounts of unpaid capital. To allow such deductions would, in effect, give to creditors who are also stockholders a preference over the other creditors in bankruptcy. But if the creditors who are also stockholders prove their debts under the bankruptcy, deductions equal to their estimated respective dividends may, perhaps, be made from the amounts of the assignee's demands against them respectively as stockholders. The register is authorized to make and report, as occasion may arise, the approximate estimates for such deductions on equitable principles. Such estimates and reports may be made after the general decree for the full respective amounts of unpaid capital.

The attachment executions which were prior to the commencement of the proceedings in bankruptcy cannot prevent the entering of the decree, or prevent its enforcement. But

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the decree will be made without prejudice to the rights, if any, of the respective attaching creditors; and each one may, if so advised, intervene for his own interests.

The Lehigh Valley Iron Company was not an original stockholder, but holds fifty shares, under a transfer made by an original stockholder. The transfer was made and accepted for a purpose incidental to the business of this company, and the acceptance cannot be considered beyond its corporate powers. On the question whether a transferee of stock in the bankrupt company is liable to the present demand of the assignee, all the decisions in several States of the Union cannot be reconciled. If the preponderance of authority were doubtful, it would be determined on the affirmative side of the question by the opinions of the Supreme Court of the United States, in 1 Otto, 65, and the English Court of King's Bench, in 7 T. R., 36, 46. In Pennsylvania, if the point has never been decided affirmatively in the case of a corporation chartered by her own Legislature, the preponderance of authority is on the same side. The cases of *Trevor v. Perkins* (5 Whart., 244), and the *Merrimac Mining Company v. Levy* (4 P. F. Smith, 227), show this; and there is nothing decided to the contrary in the *West Philadelphia Canal Company v. Innes* (3 Whart., 198). If the cases of *The Canal Company v. Sansom* (1 Binney, 70), and *Palmer v. The Ridge Mining Company* (10 Casey, 288), are not overruled on this point, their authority upon it is now limited, so that they apply only where a corporation is authorized, by its charter, to forfeit the stock of a delinquent shareholder for non-payment of dues. The present is not such a case, and any doubt from these two decisions, which might otherwise have arisen, is removed by the remarks upon them in 4 P. F. Smith, 229, 230, and 1 Otto, 70.

The decree must, therefore, be against the Lehigh Valley Iron Company, on the same footing as against the original subscribers.

A like effect is attributable to the transfer of Dewees J. Martin's stock to Dr. E. G. Martin. If this transfer had been a recent one, and had been either simply to secure a debt, or

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upon trust for the general benefit of creditors, Dr. Martin would perhaps have been entitled in equity to elect whether to accept or to reject the stock; and if he had, after the death of D. J. Martin, acquired it as administrator, he might have held it in the representative capacity only. But the evidence does not sufficiently establish his allegations; and his delays and omissions have been such that the decree must be against him, as if he had, in 1872, been the acceptor of an absolute transfer.

Levi Line transferred his one hundred and thirty-five shares to C. H. Nimson. But Nimson did not accept the transfer. Line, therefore, and not Nimson, is liable in respect of these shares. But Nimson, as to fifty other shares, is liable as an original subscriber.

Willoughby Fogel subscribed the articles of association, but died before giving any subscription note. The subscription note was given by his widow, Maria Fogel. The register appears to have considered her the proper party against whom payment should be decreed. It may be proper that counsel be heard again as to this case, if it is of practical importance to determine whether the liability is that of her deceased husband's estate.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

MAY 23, 1878.

On application for a final order of confirmation of a proposed composition, the report of the register must, for the purposes of such application, be taken to be a true and full report of all the proceedings before him. If parties are dissatisfied with it, either because of alleged omission or mistake, they should move promptly to have it referred back for correction. The other party is entitled to have notice of such proposed correction before the motion for confirmation comes on for argument.

If, through accident or design, the notice of the first meeting fails to reach creditors whose presence at the meeting might alter the result of the vote, and the court is satisfied that their failure to attend was owing to the failure of the notice alone, and that their votes would have changed the result, it is proper and right that on their application the meeting, if closed, should be reopened and the vote of each person received and counted; but such relief should be applied for promptly, and one who lies by until the second meeting has been called and convened cannot

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then ask to have the first meeting reassembled, unless the delay is excused for sufficient cause.

When the register has decided as to the right to prove and vote upon a particular claim as between two parties who claim such right, the proper course for the party aggrieved is to apply for an adjournment of the meeting till his right as a creditor can be tested and passed upon by the court before the final vote is taken. He may ask to have the question certified to the court upon the testimony before the register; or, if he desires to produce further evidence, he should ask leave to produce it, and if necessary ask for time. If, however, he submits to the decision, and without farther objection allows the vote to be taken, he cannot ordinarily be allowed to reopen the question at the second meeting, upon consideration of the question whether the requisite majority present at the first meeting have assented to the composition.

If any party is aggrieved by the rulings of the register on his application for time or opportunity to prove his right to vote or to disprove another claimant's right, it is competent for the court, in order to secure a full and fair vote, to reopen the meeting and adjourn it, and provide for the proper determination of all questions of the right to vote in some suitable way before a final vote is taken, and upon the coming in of the report of the register his rulings on these questions as disclosed by the record are subject to the review of the court for the determination of the question whether the requisite majority of those present have assented to the composition.

The composition was only two per cent. The largest creditor without whose vote, if she had been present, it could not have been passed, was strongly opposed to it. Owing to a misdirection of the notice by accident or design, she was not present to vote. There was also a doubt as to the right of one of the consenting creditors to vote. *Held*, That the composition was not for the best interests of the creditors; that there was a formal but not a real compliance with the requirements of the law as to the consenting majority of creditors.

In re ALEXANDER R. SPENCER.

THE facts appear fully in the opinion.

W. E. Smith, for bankrupt.

J. G. Gay and *G. H. Starr*, for consenting creditors.

H. B. Ferguson, for S. K. Spencer.

CHOATE, J.—This is a motion for a final order of confirmation of a proposed composition offered by the bankrupt. Upon this motion affidavits are offered on behalf of opposing creditors for the purpose of showing errors in the reports of the register of the proceedings at the first and second meetings in composition, in that the register omitted to make any record of objections taken and other proceedings at the meetings, and in that he misstated what did take place. So far as the objec-

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tions to the order of confirmation rest on this ground they must be overruled.

The report of the register must be taken to be a true and full report of all the proceedings before him for the purposes this motion, and if parties are dissatisfied with his report, either because of alleged omission or mistake, they should move promptly to have it referred back for correction. The other party is entitled to have notice of such proposed correction before the motion for confirmation comes on for argument.

In this case, however, it appears by the report of the register that proof was made at the first meeting, by one Clarkson, on two judgments recovered by one Seagrave, in the year 1872, against the bankrupt jointly with Samuel K. Spencer and Margaret A. Spencer, which judgments were upon notes made by the bankrupt to the order of and indorsed by Samuel K. Spencer, the judgments amounting together to four thousand and thirty-four dollars and thirty-seven cents. The deposition alleged that the judgments had been duly assigned to Clarkson, and that he was the lawful owner and holder thereof. No written assignment was produced or proved. At the same meeting, and on the same day, one Samuel K. Spencer filed a deposition for proof of claim for four thousand nine hundred and seven dollars and forty-seven cents, including said two judgments as belonging to him, which proof was objected to by the attorney for Clarkson. The bankrupt produced his sworn statement of debts and assets, in which Clarkson appears as the owner of these judgments, and wherein it is stated that they were recovered on notes made by the bankrupt for the accommodation of Samuel K. Spencer, which were discounted by Seagrave for Samuel K. Spencer, who received the amount thereof, and that they had been assigned to Clarkson. The bankrupt then submitted his proposition for a composition, and the meeting was adjourned for the purpose of having objections filed to the proof made by Samuel K. Spencer. Upon the adjourned day Samuel K. Spencer appeared with counsel. The bankrupt filed objections to his proof, and after hearing counsel the register held that he should be admitted as a cred-

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itor to the amount of one thousand dollars, excluding his claim as the owner of these two judgments.

The meeting then without objection, so far as appears, proceeded to consider and vote upon the composition. Clarkson voted yea on five thousand and thirty-four dollars and thirty-seven cents, by inadvertence apparently, his claim being overstated by one thousand dollars. Samuel K. Spencer voted nay on one thousand dollars. The vote was seven creditors in the affirmative, whose debts amounted to thirteen thousand six hundred and thirty-three dollars and fifty-two cents. In the negative two creditors, whose debts were one thousand six hundred and seven dollars and twenty-six cents.

The first meeting was closed December 17, 1877. The second meeting was called for the 28th of March, 1878. At this meeting Samuel K. Spencer appeared with counsel, also Clarkson and other creditors.

The attorney for Samuel K. Spencer produced a new proof of his claim, sworn to March 28, 1878, in which, besides his claim for one thousand dollars on a promissory note on which he had been allowed to vote, he included the two judgments above referred to, averring in his deposition that the notes on which they were recovered were made by the bankrupt for value and delivered to him; that he indorsed the same and delivered them to Seagrave to secure the sum of one thousand dollars loaned by Seagrave to him; that he afterwards paid the loan and received the notes back; that the notes were protested and he instructed his attorney to sue on the notes and make himself a defendant as indorser, because he did not want to sue his brother in his own name; that Seagrave held the judgment in trust for him and he had never consented to an assignment. The proof was objected to by the bankrupt on the ground that by the transcript of the judgment Samuel K. Spencer appeared to be a judgment debtor, that his claim had been already passed upon at the first meeting, and on other grounds. The attorney for Samuel K. Spencer objected to the claim of Clarkson. Another creditor, Mrs. Thomas, also objected to Clarkson's claim, and filed written objections to it. The regis-

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ter held that these matters were not subjects of inquiry at this meeting, and the meeting adjourned. On the adjourned day the counsel for Samuel K. Spencer offered to prove, by witnesses then in court, that the two judgments proved by Clarkson really belonged to Samuel K. Spencer.

The counsel for Clarkson objected that the question could not be entertained at that stage of the proceedings, and that the question had been passed on at the first meeting and that no objection had been then made to Clarkson's claim. The register held that he had no authority at this meeting to take the proof which was offered.

The counsel for creditors opposing the composition proposed to examine the bankrupt. This was objected to on the ground that the application was too late, and the register so held. The meeting was then declared closed.

In opposition to the confirmation of the composition one Augusta Thomas now makes affidavit that she did not, in fact, receive the notice or any notice of the first meeting until it was too late for her to attend; that she has resided at 76 Norfolk Street, in this city, for three years last past, and never resided at 79 Norfolk Street, the address given as her place of residence in the schedule of creditors, and to which, as appears by the record, her notice was sent. She also swears that her true address was well known to the bankrupt. Her debt, which was proved immediately after the first meeting, amounts with interest to about eight thousand dollars. She is opposed to the composition, and if she had been present at the first meeting in all probability it would not have been approved, as her vote would have been sufficient to defeat it.

This case presents some interesting questions as to the proper practice in composition proceedings. The terms of the law which make the validity of the composition to depend upon its receiving the approval of a certain proportion in number and value of the creditors present at the meeting, render it very important and indeed essential that proper measures should be taken to notify creditors of the meeting, and that before a vote is taken the question of the right of persons

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claiming to vote should be properly determined. As to the notice, ordinarily, the proof by affidavit of the giving of the regular notice through the mail to all the creditors named in the schedule will be held sufficient and conclusive of the regularity of the notice; but if, through accident or design, this notice fails to reach creditors whose presence at the meeting might alter the result of the vote, and the court is satisfied that their failure to attend the meeting was owing to the failure of the notice alone, and that their votes would have changed the result, it certainly would be proper and right that on their application the meeting, if closed, should be reopened, and the vote of each person received and counted. If, however, this relief is sought, it should be applied for promptly, and one who lies by till the second meeting has been called and convened can hardly ask them to have the first meeting reassembled, unless the delay is excused for sufficient cause. In this case the creditor, Mrs. Thomas, was telegraphed for while the first meeting was in session, but arrived too late to cast her vote. She made proof of her claim, however, on the same day, December 17, 1877. I think her delay to move for relief, on the ground of the failure to get the notice, till March 28th, was such *laches* as should now bar her claim to object to the vote taken at the first meeting as irregular. The fact, however, that she, the largest creditor, strenuously objects to the composition is a circumstance that should have its due weight with the court on the question whether the composition proposed is for the best interests of the creditors.

As to the determination of all questions respecting the right to vote, and the amount on which any party claiming to be a creditor shall be allowed to vote, from the necessity of the case the statute must be construed to give the court power to determine such questions, and as the meeting is held not in court but before the register, the duty devolves on him to determine the question in the first instance from such proofs of claim and other evidence as the parties may offer. Whether this decision, when made by the register or by the court, is controlling for any other purpose than that of determining how the

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creditor shall rank for the puposes of this vote is not in question in this case.

The question of the right of Clarkson or of Samuel K. Spencer to vote as the owner of the two judgments was virtually passed upon by the register at the first meeting in favor of Clarkson. This proof was undoubtedly defective, in that the assignment from Seagrave, the judgment creditor, to him was not produced. It may have been by parol, but that would be extraordinary, and there is no evidence of it. Samuel K. Spencer seems to have submitted his case to the register at the meeting, and the proof offered by Clarkson was decided to be regular, and that offered by Spencer insufficient, and it was held that Clarkson, and not Spencer, was entitled to vote on these claims. I think, under these circumstances, the proper course is for the party making claim thus disallowed to apply to the register for an adjournment of the meeting till his right as a creditor can be tested and passed upon by the court before the final vote is taken.

He may ask to have the question certified to the court upon the testimony before the register, or if he desires to produce further evidence, he should ask leave to produce it, and if necessary ask for time. If, however, he submits to the decision, and without further objection allows the vote to be taken, I think he cannot ordinarily be allowed to reopen the question at the second meeting, upon consideration of the question whether the requisite majority of creditors present at the first meeting has assented to the composition. I say *ordinarily*, because cases may arise where, by reason of newly discovered evidence or on other equitable grounds, the party should not be concluded even by his acquiescence in the taking of the vote.

If any party is aggrieved by the rulings of the register on his application for time or opportunity to prove his right to vote, or to disprove another claimant's right, it is competent for the court, in order to secure a full and fair vote, to reopen the meeting and adjourn it, and provide for the proper determination of all questions of the right to vote in some suitable way before a final vote is taken, and upon the coming in of the

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report of the register, his rulings on these questions, as disclosed by the record, are subject to the review of the court, for the determination of the question whether the requisite majority of those present has assented to the composition.

In this case Spencer apparently acquiesced in the decision of the register, and took no measures to have the question reheard until the second meeting was convened on the 28th of March. He then proposed to try before the register the same question with witnesses. Such practice would be very inconvenient in keeping the creditors together till such trial could be had, and in the absence of special circumstances excusing the delay and justifying the reopening of the question, the register properly declined to receive the evidence. Spencer in his deposition does not show any particular merits. His statement is so extraordinary as to his ownership of the judgments in which he was a judgment debtor that it would require a considerable weight of evidence to prove such a claim. The remarks above made in relation to the examination of the claim of Spencer apply also to the re-examination of the proof of debt made by Clarkson. Any other creditor present at the first meeting could have applied to have Clarkson's claim re-examined, and Mrs. Thomas, though not present at the meeting, could have applied, on the case now made by her affidavit, to have the meeting reopened and her objections to Clarkson's claim considered, but the register very properly held that the application at the second meeting was too late so far as the question of the right to vote at the first meeting was concerned.

In all such questions it should not be overlooked that the Bankrupt Law affords and was intended to give speedy and summary methods for the settlement of insolvent estates, and that therefore great diligence should be required of all parties, where the want of such diligence will embarrass or delay other parties in interest. I do not, however, question the right or duty of the court *at any time* to entertain applications intended to correct mistakes, expose fraud or improper practice, or to bring to the notice of the court in these composition proceed-

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ings any matters that may properly be considered in determining whether the composition is fair and proper.

Thus I am brought to the conclusion that the proceedings of the meeting have been regular, and that neither of the parties claiming to be aggrieved is in a position to ask as a matter of right that the proceedings be set aside, or the composition rejected on the ground of irregularity.

The question still remains, however, whether it is for the best interests of creditors that it should be confirmed and recorded. The composition is only two per cent. No creditor has any very large interest certainly in its confirmation, although there is an apparent entire want of assets. The largest creditor, without whose vote, if she had been present, it could not have been passed, is strongly opposed to it. Her address was by accident or design erroneously given in the schedule of creditors by which the notices of the first meeting were issued, and she was not present to vote.

I am not entirely satisfied about Clarkson's right to vote.

On all the circumstances, I am not able to bring myself to the belief that for so small a consideration as two per cent. on their debts it is for the best interests of the creditors to release the debtor from ninety-eight per cent.

There has been a formal but not a real compliance with the requirements of the law as to the consenting majority of the creditors.

Order refused, without prejudice to the right of the bankrupt to propose the same or other composition.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

AUGUST 1, 1878.

Where there is an undoubted partnership, oral evidence is admissible to prove that the factory in which the partners carried on their business, and upon which they expended their money, was a part of the capital stock contributed by them; and where such evidence is clear and undisputed, and

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admitted to be true, the property in question is to be treated in bankruptcy as the property of the firm; if on no other ground, then clearly on that of part performance.

In re FARMER et al. Ex parte GRIFFIN.

John P. Farmer, Edward H. Sherman, and Edward A. Beekman, co-partners, carried on the business of making and selling straw goods, under the firm name of Farmer, Sherman & Company, at Franklin, in Massachusetts, and of S. A. Beekman & Company, in New York. They became bankrupts in this district, and Henry M. Greene, the respondent, was duly appointed the assignee of their estate. They offered a composition to their creditors, which was accepted and recorded, and the respondent is engaged in carrying it into effect.

The petitioner, Sarah Griffin, is a separate creditor of Sherman, and asks that the assignee be restrained from applying certain lands and buildings, being the factory in which the manufacture was carried on, and the lands connected therewith, to the payment of the joint debts, alleging that one undivided third thereof is the separate property of Sherman.

The case was submitted on agreed facts, by which it appeared: That Farmer and Sherman had formerly been partners in the same business with a person who retired and conveyed to them his interest in the factory. In January, 1876, an agreement of partnership was made between the persons now bankrupt, and articles were drawn up by which each partner was to contribute capital to the amount of twenty thousand dollars; how the contribution was to be made was not stated; but the oral agreement was that Farmer and Sherman were to put in the factory, and Beekman money. Beekman paid the money, and Farmer and Sherman conveyed to him one undivided third part of the land, but the deed did not say anything about the partnership. Beekman carried on the selling in New York, and Farmer and Sherman the manufacturing in Franklin. A small piece of land was added afterwards, and in the deed the parties were described as partners, though the *habendum* was to them as tenants in common. An account was opened in the firm books called "Factory," in

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which Farmer and Sherman were each credited with twenty thousand dollars, and to which account were carried several additions and improvements which were made to the machines and machinery, and paid for by the money of the firm. The books were kept in New York, and trial balances were drawn off from time to time by the bookkeeper, in which the balance of the factory account, and of the account of each partner, was shown. They were headed with the name of the firm, and were made out by a clerk duly authorized to make them. The joint property, without the factory, is not sufficient to pay the composition on the joint debts.

G. W. Wiggin, for petitioner.

The partners were seized in fee as tenants in common of this land. (*Goodwin v. Richardson*, 11 Mass., 469; *Burnside v. Merrick*, 4 Met., 537; *Dyer v. Clark*, 5 Met., 562; *Howard v. Priest*, ib., 582; *Whitman v. B. & M. R.R.*, 3 Allen, 133; *Wilcox v. Wilcox*, 13 Allen, 252; *Shearer v. Shearer*, 98 Mass., 107.)

There can be no resulting or implied trust for the firm, because the money of the firm did not pay for the land. The conveyance to Beekman of one-third cannot affect the title to the remaining two-thirds. No trust can be raised by an oral agreement that the land should be partnership property. (Gen. Stats. (Mass.), Ch. 100, Sec. 19, Ch. 105, Sec. 1, part 4; *Homer v. Homer*, 107 Mass., 82; *Smith v. Burnham*, 3 Sumner, 435; *Parker v. Bowles*, 57 N. H., 491; *McCormick's Appeal*, 57 Penn. St., 54; *Lefevre's Appeal*, 69 Penn. St., 122; *Ebbert's Appeal*, 70 ib., 79.)

A resulting trust can only arise from the payment of the purchase money, and it must be contemporaneous with the purchase; lands already held by the supposed trustee cannot be charged with such a trust. (*Botsford v. Burr*, 2 Johns. Ch., 405; *Capen v. Richardson*, 7 Gray, 364; *Kendall v. Mann*, 11 Allen, 15; *Titcomb v. Morrill*, 10 Allen, 15; *Richards v. Manson*, 101 Mass., 482; *Barnard v. Jewett*, 97

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Mass., 87; *Purcell v. Miner*, 4 Wall., 513; *Thompson v. Gould*, 20 Pick., 134; *Cook v. Doggett*, 2 Allen, 439; *Glass v. Hulbert*, 102 Mass., 24; *Blodgett v. Hildreth*, 103 Mass., 484; *Rogers v. Murray*, 3 Paige, 390; *Forsyth v. Clark*, 3 Wend., 637.)

J. D. Ball, for assignee.

The trial balances, and the entries in the books, are a sufficient note or memorandum to satisfy the Statute of Frauds. (*Hawkins v. Chace*, 19 Pick., 502; *Penniman v. Hartshorn*, 13 Mass., 87; *Salmon Falls Co. v. Goddard*, 14 How., 446; *Sanborn v. Flagler*, 9 Allen, 474; *Coddington v. Goddard*, 16 Gray, 436; *Morton v. Dean*, 13 Met., 385; *Gill v. Bicknell*, 2 Cush., 355; *Fessenden v. Mussey*, 11 Cush., 127; *Lerned v. Wannemacher*, 9 Allen, 412; *Tufts v. Plymouth Gold Co.*, 14 Allen, 407; *Johnson v. Trinity Church*, 11 Allen, 123; *Chase v. Lowell*, 7 Gray, 33; *Rhoades v. Castner*, 12 Allen, 130; *Browne*, St. Frauds, 358.)

A partnership in lands is not within the Statute of Frauds. Land bought or used for the purposes of a partnership is, in equity, the property of the firm. (Collyer, Sec. 148; 1 Lindley, 687; Story, Sec. 93; *Peck v. Fisher*, 7 Cush., 386; *Fall River Whaling Co. v. Borden*, 10 Cush., 458; *Richards v. Manson*, 101 Mass., 482; *Marrett v. Murphy*, 11 N. B. R., 131; *Hiscock v. Jaycox*, 12 N. B. R., 507; *Johnson v. Rogers*, 15 ib., 1; *Thrall v. Crampton*, 16 ib., 261; *Pierce v. Trigg*, 10 Leigh, 406; *Lyman v. Lyman*, 2 Paine, 11; *Collumb v. Reed*, 24 N. Y., 505; *Tillinghast v. Champlin*, 4 R. I., 173; *Hoxie v. Carr*, 1 Sumner, 173; *Philips v. Crammond*, 2 Wash., C. C., 441; *Pratt v. Oliver*, 3 McLean, 27; *McAllister v. Montgomery*, 3 Hayw., 94; *Hunt v. Benson*, 2 Humph., 459; *Richardson v. Wyatt*, 2 Dessaus, 471; *Greene v. Greene*, 1 Ohio, 535; *Sumner v. Hampson*, 8 Ohio, 328; *Ludlow v. Cooper*, 4 Ohio St., 1; *Buck v. Winn*, 11 B. Mon., 320; *Galbraith v. Gedge*, 16 B. Mon., 631; *Wooldridge v. Wilkins*, 3 How. (Miss.), 360; *Hopkinson v. Dumas*, 42 N. H., 296; *Kramer v. Arthurs*, 7 Barr, 165; *Dale v. Hamilton*, 5 Hare, 369; *Darby*

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v. *Darby*, 3 Drew., 495; *Foster v. Hale*, 3 Ves., 696, 5 Ves., 808; *Lake v. Craddock*, 3 P. Wms., 158; *Essex v. Essex*, 20 Beav., 442.)

LOWELL, J.—It is a familiar principle that real estate which is the property of a firm must, in equity, be applied to the payment of the debts of the firm, however the legal title may stand. The right to require this application subsists in each partner, or in his representatives, until the joint affairs are settled, and is superior to the rights of the widow, or heirs, or separate creditors of the several partners.

Assignees in bankruptcy of the partners, or any of them, are bound by this rule, which indeed is, to a certain extent, expressed in the Bankrupt Act.

The petitioner admits all this, but contends that, under the Statute of Frauds of this Commonwealth, there is no competent evidence that the factory of the bankrupts was co-partnership property, excepting that small part of the land which was bought after this firm was formed. He cites two provisions of the statute: One, that no action shall be brought upon a contract for the sale of land, unless the contract, or some note or memorandum thereof, is in writing, may be laid out of the case, because no question arises here concerning any such contract. The other provision is, that no trust concerning lands, excepting such as may arise or result by implication of law, shall be created or declared, unless by an instrument in writing signed by the party creating or declaring the same, or by his attorney. (Gen. Stats., Chap. 180, Sec. 19.)

Whether the Statute of Frauds has any application to partnership affairs, has been seriously doubted. In 1800, the lord chancellor, in a case much cited since, said that a partnership may be proved by any appropriate evidence, and, when proved, the premises necessary for the purposes of the partnership are, by operation of law, held for the purposes of that partnership. (*Forster v. Hale*, 5 Ves., 308.) Again, in another celebrated case, an eminent vice-chancellor established a trust for the benefit of a plaintiff against the heirs of one who had bought

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lands upon an oral agreement to share profit and loss with the plaintiff as a partner. (*Dale v. Hamilton*, 5 Hare, 369.)

These decisions have been mentioned with approval, or followed in several cases in the United States. (*Fall River Whaling Co. v. Borden*, 10 Cush., 458; *Frederick v. Cooper*, 3 Iowa, 171; *York v. Clemens*, 41 Iowa, 95; *Essex v. Essex*, 20 Beav., 442; *Chester v. Dickerson*, 54 N. Y., 1.)

It is to be observed, however, that when there has been no actual partnership business carried on by the parties, so that there is no part performance, and the plaintiff is seeking to obtain an interest in lands simply by oral evidence of an agreement on the part of the only person (the defendant) who has bought and paid for the lands, or had ought to do with them, that he will share profit and loss with the plaintiff, the case differs from any other case of trust only in the language attributed to the parties in the supposed oral agreement about the lands themselves. The distinction between an agreement to hold as a partner, and one to hold as joint owner, is certainly somewhat nice.

This particular point is considered by some late writers not to be, as yet, definitively established. They point out that *Dale v. Hamilton* was affirmed by the lord chancellor on a different ground (*Dale v. Hamilton*, 2 Ph., 266), and that its authority is shaken by *Caddick v. Skidmore* (2 DeG. & J., 52).

Several important decisions in this country are opposed to *Dale v. Hamilton*. (See Story, Part., Sec. 93, and Mr. Gray's note in 6th Ed.; Lindley, 3d Ed., 90, 91; *Smith v. Burnham*, 3 Sumner, 435; *Henderson v. Hudson*, 1 Munf., 510; *Bird v. Morrison*, 12 Wis., 138.)

Smith v. Burnham, *ubi supra*, is an authority here. Unless the courts of the State have construed their statute differently from that decision, or unless this case can be distinguished from that, I am inclined to think that both points might be maintained. No simple question of trust arises here. Where, by distinct and unimpeached evidence a partnership has been proved to exist, and to have carried on business for months or

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years, the question whether certain real estate standing in the name of one or more of the partners is partnership property, has not usually been treated as a question arising under the Statute of Frauds.

The evidence has all been examined with a view to discover the intention of the parties.

No doubt in a large number of the cases the land has been bought with the joint funds, which might raise a resulting trust.

And the petitioner argues that it is only in such cases that the principle has been applied. But the doctrine of resulting trusts is not adequate to explain those decisions. If partners buy land with the joint funds, and cause them to be conveyed to themselves in the same proportions in which they are interested in the capital, the presumption is quite as strong that they intended a division of capital, as that they had merely changed an investment.

Everything depends on the circumstances of each case, or the actual agreement of the parties, if there was one, and Mr. Lindley says that no satisfactory distinction with reference to the question of conversion can be drawn between land bought with partnership moneys and land acquired in any other way, provided such land is in the proper sense of the expression an asset of the partnership (3d Ed., p. 690) ; and again : " Property which has been used and treated as partnership property cannot be presumed to belong to one partner simply because he paid for it, for the presumption in such a case is rather that the property in question was his contribution to the common stock." (P. 665.)

In *Bird v. Morrison* (12 Wis., 138), which agrees with the decision in *Smith v. Burnham* (3 Sumner, 435), the learned judge who delivered the opinion of the court said : " Where the title is held by all the partners jointly, so as to be entirely consistent with the character of partnership property, the fact of partnership may be shown by parol, and that the property was held for partnership purposes, and from these facts the court will imply its partnership character, and such trusts as result therefrom." (Per Paine, J., p. 155.)

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In the present case the bankrupts held this land as tenants in common; there is no such tenancy known in law or equity as copartnership; but partners in equity hold as tenants in common.

What occasion is there then for a declaration of trust? Though the partners may be called, in a certain sense, trustees or quasi trustees of the joint stock—that is, though they are bound to apply that stock to the payment of the joint debts, this agency or trust results or is implied from the connection between the parties, and is declared by the fact that they are partners.

The exact question is, whether one of the tenants in common has a lien on the share of his co-tenants for the payment of the joint debts and other dues arising out of the business; and the statute does not say that no lien shall arise or be operative between co-tenants unless declared in writing. (See *Leading Cases in Equity*, 5th Am. Ed., 496.)

In this connection it is worthy of remark that the Statute of Frauds of this Commonwealth in the next section to this, which I have already quoted, provides that no trust in lands, whether expressed in writing or implied by law, shall prevent a creditor having no notice of the trust from attaching or seizing the lands, as if there were no trust. (Gen. Stats., Chap. 100, Sec. 20.) Now in several early cases, which were very carefully argued and considered, and in which the precise question of an equitable lien of this sort between partners who were tenants in common was decided in favor of the joint creditors, and against separate creditors who had levied, or who in bankruptcy stood like execution creditors, no notice was proved or even alluded to as having been given to the separate creditors, which shows that the counsel and the court were of opinion that the equity in question, though they sometimes speak of it as a trust, was not such in strictness of law, because if it were, then, whether it avoided the statute because it was a resulting or implied trust, or came within it as a direct trust, in either case it would not have availed against the separate creditors without notice to them. (See *Burnside v. Merrick*,

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4 Met., 537; *Dyer v. Clark*, 5 Met., 562; *Howard v. Priest*, ib., 582; *Peck v. Fisher*, 7 Cush., 386; *Fall River Whaling Co. v. Borden*, 10 Cush., 458.)

These cases were decided on general grounds of equity, taking for granted that the Statute of Frauds was out of the question.

However, I do not deem it essential to ascertain whether this equity is a trust concerning lands, because, if it is so, the facts disclose such a part performance as would, in equity, require the court to admit the oral evidence. The doctrine of part performance stands upon the fraud or hardship which would be operated by leaving the parties to an action at law for damage or the recovery of money, when their position has been so far changed that the judgment in such an action would furnish no adequate relief. (See the terse statement of Grier, J., in *Purcell v. Miner*, 4 Wall., 513, 518.)

Where partners have gone on in business and contracted debts on the faith of a contribution of land by some of them, and of money by others, it would be the greatest hardship to leave the land liable to the separate debts of the several partners, and thus to leave the partner who furnished money to bear so much more than his just share of the deficiency.

This is very forcibly shown by Shaw, C. J., in his judgment in the leading case of *Dyer v. Clark* (5 Met., 562), and though that happened to be a case where the joint funds were used in the purchase, the argument is as well applicable to the point of part performance. And when the land, as in this case, was used for the manufacture of the goods, there cannot be any question that notice to all the world would be presumed.

It was on this ground of fraud or hardship that Judge Ware decided in favor of the joint creditors. (*In re Warren, Daveis*, 320; 2 Ware, 322.) He distinguished that case from *Smith v. Burnham* (3 Sumner, 435), upon the rights of creditors as being beyond those of the partners. This is not a valid distinction. The rights of the creditors depend upon those of the partners, but the fundamental idea was sound. It would be a fraud, as he said, on the joint creditors, but it would be

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so because it would be one upon the partners themselves, which was not the case in *Smith v. Burnham*.

Whatever the argument may be, it is certain that the authorities are entirely decisive, that when there is an undoubted partnership, oral evidence may be received to prove what lands are the property of the partnership. I leave out all those very numerous cases in which the money of the partnership has been used in the purchase; although, as I have already observed, they cannot be fully explained on the theory of resulting trusts. (See in addition to cases above cited, *Lake v. Craddock*, 3 P. Wms., 158, and the note to that case in 1 Lead. Cases Eq., 4th Am. Ed., 265; *Fereday v. Wightwick*, 1 Russ. & M., 45; *Hanff v. Howard*, 3 Jones' Eq. (N. C.), 440; *Meily v. Wood*, 71 Penn., 488; 1 Am. Lead. Cases, 5th Ed., 496; notes to *Dyer v. Dyer*; *Jeffereys v. Small*, 1 Vern., 217; *Jackson v. Jackson*, 9 Ves., 591; *Crawshay v. Maule*, 1 Swanst., 495). One further remark may be added. The partners have never denied the trust, if trust it be. The assignee succeeds to their rights and duties, and if he finds property of theirs clothed with a trust which no one has ever disputed, it is by no means certain that the Bankrupt Law would forbid a declaration of the trust to be made after the beginning of the bankruptcy. It was held in one case in England, that a declaration of trust made by a bankrupt after he had committed an act of bankruptcy, that is to say, after the time to which his assignee's title would relate, corresponding to the petition in bankruptcy under our law, was valid if it could be clearly proved, though not by written evidence sufficient to satisfy the Statute of Frauds, that such a trust in fact existed. The reasoning was, that though a bankrupt cannot deal with his property or create new rights or obligations (excepting where he does it with innocent person having no notice), yet that a mere declaration to conform to the fact, and do actual justice, was not a dealing or conveyance which a court of equity could declare to be unauthorized. (*Gardner v. Rowe*, 2 Sim. & S., 346.)

I prefer to rest my decision upon the proposition that in a

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case of this kind oral evidence may be admitted to prove that the factory in which the partners carried on their business, and upon which they expended their money, was a part of the capital stock contributed by them, and that the oral evidence being clear and undisputed, and admitted to be true, the property in question is to be treated in bankruptcy as the property of the firm; if on no other ground, then clearly on that of part performance, and it must be applied accordingly.

Petition dismissed.

UNITED STATES DISTRICT COURT—VERMONT.

AUGUST 6, 1878.

In 1872 the bankrupt sold certain government bonds belonging to his sister, which were then in his hands, and out of the avails paid and took up a mortgage note which then fell due, secured on certain real estate, and kept the balance to his own use. At that time he also owed his sister for a balance of interest he had previously received and had other government bonds of hers which he had or afterwards pledged for his debts. During the following six years he paid her money from time to time, which was charged against the interest received by him upon her bonds and not otherwise applied by either. *Held*, That she was entitled to be treated as if she had held the mortgage from the time he took it up; that the payments should be applied upon the interest and not to the balance of avails of the sale, and that she was entitled to a lien equivalent to a mortgage lien for the payment of the sum found to be due to her after application of such payments.

JANE E. DEWEY v. *S. S. KELTON*, Assignee, and
JOHN P. DEWEY.

S. C. Shurtliff, for oratrix.

B. F. Fifield and *Gleason & Field*, for defendants.

WHEELER, J.—This cause has been heard on pleadings, proofs, and arguments. It appears beyond question that the bankrupt defendant, John P. Dewey, on the 26th day of April, 1872, sold government bonds amounting to three thousand dollars then in his hands, most of which belonged to the

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oratrix, his sister, and the rest either to her or their mother, for three thousand four hundred dollars and fifty cents net, and out of the avails paid and took up a mortgage note of two thousand four hundred and thirty-six dollars, due that day with interest annually, on which two years interest amounting to three hundred and one dollars and eight cents had accrued secured on the premises in question owned by him.

There is some confusion on the evidence as to which, she or her mother, owned the bonds sold; they were not clearly hers, but on the whole it satisfactorily appears that upon the understanding between her and her mother and the bankrupt they were hers.

They were so sold and the avails so used without her knowledge or consent.

They were left with him to be taken care of, exchanged for others if he should think best, and to have the coupons collected.

It is claimed in behalf of the assignee that the transaction created a mere debt. But they were her bonds in his hands to be held for her, not his bonds in his hands for which he owed her. She had trusted to his care, not his responsibility. He held them in trust, not as his own. He converted them in violation of the trust.

In Story's Eq. Jur., Section 1258, it is said: "Whenever the property of a party has been wrongfully misapplied, if its identity can be traced, it will be held in its new form liable to the rights of the original owner or *cestui que trust*." And in Section 1259: "It matters not in the slightest degree into whatever other form different from the original the change may be made, whether it be that of promissory notes, or of goods, or of stocks, for the product of the substitute for the original thing should follow the nature of the thing so long as it can be ascertained to be such. The right ceases only when the means of ascertainment fail, which of course is the case when the subject matter is turned into money and mixed and confused in a general mass of property of the same description."

These doctrines are recognized in the laws of the State, which

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always govern as to such rights of property. (*Abell v. Howe*, 43 Vt., 403.) And by the highest judicial tribunal of the land. (*Cook v. Tullis*, 9 N. B. R., 433, 18 Wall., 332.)

The money that these bonds brought went directly to take up this mortgage. It is distinctly traceable there. The mortgage constitutes a title to the property to that extent. He in effect bought it with her property. As against him, in a court of equity, she had the same right to the property that she would have had in it if she had bought the mortgage and taken it. She had the right to say that what was done with her property was done for her. By the transaction an equitable right to the mortgaged premises equal to the mortgage interest became vested in her if she should choose, as she has chosen, to take it.

The Bankrupt Law cuts off no such rights. It merely takes the property of the bankrupt, as it is subject to all trusts, and distributes it among the creditors. This has always been the policy of Bankrupt Laws. (*Scott v. Surman*, Willes, 400; *Cook v. Tullis*, 9 N. B. R., 433, 18 Wall., 332.) The assignee takes no right other than the bankrupt has, except as to property conveyed in fraud of the rights of creditors, or of certain provisions of the Bankrupt Law, and this property was not *conveyed* by the bankrupt at all. It was rather kept by him by conveying hers in fraud of her rights.

His creditors supposed, when they trusted him, that he had paid off the mortgage with his own means, and that he owned the property clear. He held himself out as such owner. It is claimed for the assignee in behalf of the creditors that it is inequitable for her now to claim the benefit of the mortgage against them. But it is not shown that she has ever done anything to mislead them. They do not appear to have inquired of her about it, and if they had she could not have told them, for she did not know more than they did that her bonds had paid off the mortgage. It is the common case of creditors deceived as to the property of their debtor. They cannot justly claim that others who have not deceived them shall give up their rights.

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She seems entitled to stand and be treated here as if she had held the mortgage from the time he took it up.

He owed her at that time one hundred and two dollars and seventy cents, for a balance of interest he had previously received.

He had five hundred dollars of other government bonds that belonged to her, which he had, or has since, wrongfully pledged for his debt.

He kept the balance of the avails of these bonds sold, six hundred and sixty-three dollars and forty-one cents to his own use.

He has through his firm paid her money from time to time since, which they mutually understood was to apply upon the interest received by him on her bonds, and it was charged against credits for such interest, and not otherwise applied by either.

He became indebted to her for the balance of the avails of the sale. It is claimed that the payments should be applied upon that debt. He had the right to make the application of any payment made by him. If he made none, she had the right. They both applied them upon the interest generally. Although she did not know of the other debt, it does not seem that she has the right to change the application, now she has found it out, more than she would have had if she then had known of it. So it must be applied upon the interest. There has been no application on any particular interest. There are several sorts to which the law must make the application. By the law of the State, payments not otherwise applied are to go first to extinguish the oldest debts to which they are applicable. (*St. Albans v. Failey*, 46 Vt., 448; *Langdon v. Bowen*, 46 Vt., 512)

And where one is secured and the other not, to the one not secured. (*Briggs v. Williams*, 2 Vt., 283.)

He received the avails of the coupons on the five hundred dollars of the bonds pledged, or the benefit of them on his debts.

The oldest due her for interest was the balance of one hundred and two dollars and seventy cents. This was all the

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interest he owed her besides the three hundred and one dollars and eight cents accrued interest on the notes. He paid her during the first year after, applicable, according to their expectations, to what was due then, one hundred and seventy dollars; during the second year, one hundred and seventy-six dollars and sixty-five cents; during the third, one hundred and twenty-five dollars; during the fourth, one hundred and thirty dollars; during the fifth, one hundred and forty-five dollars and twenty cents, and during the sixth, before the proceedings in bankruptcy, fifty-one dollars.

Applying the first payment first to the balance of interest due, then to the interest on interest due on the mortgage, and subsequent payments to, first the gold interest on the five hundred dollars of bonds pledged, then to the interest on the six hundred and sixty-three dollars and forty-one cents, the balance of the avails of the sale, then to interest on interest due on the mortgage, then to interest on the mortgage, and there remains due at the commencement of the bankruptcy proceedings three thousand three hundred and ninety-one dollars and eight cents, and which leaves paid all sums due from the bankrupt to the oratrix, including sales of coupons to April 26, 1878.

She is entitled to a lien equivalent to a mortgage lien for the payment of that sum. And as the mortgage was given for the purchase-money, and would have been valid against the homestead right of the bankrupt, so is her lien valid against it. As the whole matter is before the court, she is entitled to a decree as of a foreclosure with the usual time of redemption.

Let a decree be entered for the oratrix that she is entitled to a lien equivalent to a mortgage lien upon said premises against the assignee and the bankrupt for the said sum of three thousand three hundred and ninety-one dollars and eight cents, which with interest to the present time amounts to the sum of three thousand four hundred and seventy-five dollars and ninety-five cents, and for a foreclosure, with one year from this sixth day of August, 1878, within which to redeem said premises by payment of the last-mentioned sum with interest to the time of payment and costs.

In re Ettinger.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

AUGUST 10, 1878.

Where the bankrupt collects moneys belonging to his estate, either before or after the filing of the petition in bankruptcy, and fails to account for the same, he will be compelled to pay such moneys to the assignee.

Proceedings of this character may be instituted by summary petition.

Payment of such moneys after the filing of the petition, for interest on mortgages, will not be allowed unless shown to be for the benefit of the estate.

In re WILLIAM ETTINGER.

THE facts fully appear in the opinion.

A. Blumenstiel, for assignee.

Gardiner & Goodheart, for bankrupt.

CHOATE, J.—This is a petition to compel the bankrupt to pay over to his assignee certain moneys alleged to have been collected by him and not accounted for.

The bankrupt has been examined at great length, and his examination is chiefly relied on by the assignee as furnishing the evidence of the receipt of the money. The petition was filed against him by his creditors, October 22, 1875, and it is claimed that he received after that day five thousand one hundred and ninety-nine dollars and fifty-seven cents from various persons indebted to him, and two thousand four hundred and seventeen dollars and nineteen cents before that day, besides the sum of nine hundred and fifty dollars drawn from the bank.

The bankrupt admits the receipt of only five hundred and forty-six dollars and sixty-four cents after October 22d, and claims to have paid out a part of it, three hundred and twenty-four dollars and twenty-five cents for the benefit of his estate, and the rest in necessary household expenses; and as to all sums received before October 22d, he claims to have paid the same out to his creditors, and in paying the expenses of his

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business, except five hundred dollars which he says he gave to his wife.

The evidence is satisfactory that the bankrupt received and is chargeable with the following sums, received after the filing of the creditor's petition :

T. G. Widener.....	\$25 00
Marks.....	8 00
Bernhard.....	11 00
Copperly & Collins.....	35 50
Clark Brothers & Co.....	59 00
Gerber.....	52 52
Vogel.....	9 00
Spanganthal.....	13 00
Davis.....	54 50
Rent of Forty-eighth Street house.....	28 50
J. Gangston, January 25, 1876.....	46 88
Mrs. Gangston, per laly, October 27, 1875...	50 00
A. Rosenbaum & Co., January 4, 1876.....	96 25
J. G. Mautner, December 15, 1875.....	40 50
Scheidenbach & Bettman, January 4, 1876....	45 24
Adriance, Robbins & Co.....	11 00
Wm. Thomas.....	95 33
Bartlett, Reed & Co.....	15 75
	<hr/>
	\$696 97

As to the other sums claimed to have been received after October 22d, the evidence is not sufficient to prove that they were received after that day.

The bankrupt's testimony as to many of them is contradictory and apparently evasive, but as to several of these sums he swears that they were received before the filing of the petition, and while his testimony is entitled to little or no credit, there is no evidence from which the receipts of the moneys after October 22d can be fairly inferred. He testifies that the sheriff was in possession of his books from the 13th of October, and no entries could be made in them after that, and also that before

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the 13th of October his bookkeeper was sick, and his books were not regularly kept. He is not contradicted in these statements, although, if untrue, they would be susceptible of contradiction. Therefore as to receipts between the 14th and the 22d of October, and perhaps before the 14th, the fact that he admits payments at some time, in connection with the facts that the parties owing the money are charged with the amount on the books as due, and that no credit is given to them on the books, leaves the time of payment still uncertain, in respect to whether the money was received before or after October 22d.

As to the case of Samuels, it is proved that the bankrupt received in May or June, 1875, two notes at eight months for the amount, one thousand and ninety-seven dollars and seventy-two cents. He testifies that he sold them when or about the time he received them. No entry of this transaction appears in his cash-book, but Samuels is credited with the amount as cash in the ledger. The testimony of the bankrupt is very contradictory as to the party to whom he sold the notes, but they were produced by Samuels, and show an endorsement of the bankrupt, and of one Nathan Lithauer, who is not called as a witness. This testimony does not justify the conclusion that the bankrupt held the notes or received the proceeds after October 22d; nor does it determine at all the time when he received the money on the notes. As to this and several of the other sums claimed by the assignee to have been received after October 22d, he has not apparently exhausted the sources of evidence as to the time when the money was received, and the matter being left in doubt on the testimony of the bankrupt, he has not produced sufficient weight of evidence to sustain the burden of proof which rests on him.

There is no presumption as to the time when the moneys were received, nor is the contradictory and evasive character of the bankrupt's testimony a circumstance sufficient to supply the want of proof.

The bankrupt has not duly accounted for this money received after the filing of the petition. He had no right to pay it out without the order of the court, even for the benefit

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of the estate. The alleged payment of interest on mortgage of real estate is not proven to have been for the benefit of his estate, nor is any voucher produced for it.

If the fact of payment were clearly proven, and the benefit to the estate, these alleged payments might now be ratified and allowed, but in the absence of any such evidence, his uncorroborated statement is not a sufficient accounting.

He must therefore be charged with, and ordered to pay over to the assignee said sum of six hundred and ninety-six dollars and ninety-seven cents, with interest from the first day of January, 1876.

As to the moneys alleged to have been received before the bankruptcy, he admits receiving, before the filing of the petition, including nine hundred and fifty dollars—drawn from the bank..... \$7,545 37

From this should be deducted, as upon

the evidence they may have been

received long before, G. Samuels.. \$1,097 72

Werkless..... 59 91

Charged above as received after

October 22d, Bartlett, Reed &

Co..... 15 75 1,173 38

Leaving to be accounted for, as received within

three weeks before October 22d..... \$6,371 99

Of this it is proved by the witness Zippert,

and by the bankrupt, that he paid Zippert,

a few days before the filing of the petition :

In cash..... \$2,800 00

In note received for H. Robinson... 126 32 2,926 32

Leaving..... \$3,445 67

The bankrupt claims to have paid out all the rest in household and business expenses before the filing of the petition, but he offers no evidence whatever in corroboration of his statement, and he does not commend himself to the court as so credible a witness that his money should be considered prop-

In re Ettinger.

erly accounted for upon his bare statement that he had paid it out, especially as for the greater part of it, if so paid out, there would in the due course of business be vouchers, which he does not produce, and corroborative testimony, which also is not produced.

The result, therefore, of the case as it stands is that he is chargeable with the further sum of three thousand four hundred and forty-five dollars and sixty-seven cents, with interest from October 22, 1875.

While I think this is the proper conclusion from the testimony as it stands, I am embarrassed by the circumstance that the case of the bankrupt was submitted without the aid of counsel, and that he may be able, on taking further proof, to discharge himself as to some part of the moneys received in October, and therefore an order will be made that upon his giving satisfactory security for his appearance from time to time to abide the order of the court, further testimony may be taken as to the disposition of the moneys received before October 22d.

The following order was made upon this decision on the 13th day of August, 1878.

The petition of John Currie Wilmerding (the assignee in bankruptcy of the above-named bankrupt) to compel the said bankrupt to pay to said assignee certain moneys alleged to have been collected by said bankrupt, and belonging to his estate, coming on to be heard upon the answer filed, and the proofs taken therein, and upon consideration of said testimony and proofs, and hearing A. Blumenstiel, of counsel for petitioner in favor of the prayer of said petition, and William Ettinger in opposition, it is

Adjudged, That the said bankrupt had in his hands, at the time the petition in bankruptcy was filed against him, to wit, October 22, 1875, the sum of thirty-four hundred and forty-five dollars and sixty-seven cents. And it is also further adjudged, that the said bankrupt collected of his assets subsequent to the filing of said bankruptcy petition the further sum of six hundred and ninety-six dollars and ninety-seven cents, all of which moneys, amounting in the aggregate to the sum of forty-one

In re Tift.

hundred and forty-two dollars and sixty-four cents, has been entirely unaccounted for, and on motion of A. Blumensteil, attorney for said assignee, it is Ordered, that said William Ettinger, within fifteen (15) days from the service of this order on him, pay to the said assignee, or his attorney, the said sum of forty-one hundred and forty-two dollars and sixty-four cents, with interest thereon from January 1, 1876, and in case of default in the payment of said sum, or of any part thereof, it is Ordered, that an attachment issue against said William Ettinger as for a contempt of court to the Marshal of this District, commanding him to confine the said William Ettinger in close custody until said sum be paid. Provided, however, if the said William Ettinger shall, within said fifteen days from the entry of this order and service of a copy thereof on him, give a bond, with surety or sureties to be approved by the the court, in the penal sum of five thousand dollars, for his appearance from time to time to abide and perform any further order of the court to be made in this matter, then leave is given to said William Ettinger to give and produce further testimony before the register in charge of this case in reference to the disposition of said moneys or any part thereof, and in such case like permission is given to the assignee to produce such other testimony as he shall be advised to further sustain the allegations of said petition, or any part thereof, as well as to meet any evidence to be produced by said William Ettinger.

UNITED STATES DISTRICT COURT—E. D. NEW YORK.

MAY 20, 1878.

A refusal by the register to proceed further with the examination of the debtor without payment of his fees or security, full opportunity having been given to make such payment or deposit security before the closing of the examination, affords no ground upon which a creditor can base an opposition to the recording of a resolution of composition.
So long as the inventory is produced before the register and at all times made accessible to the creditor for the purpose of examining it or the bankrupt

In re Tift.

in respect to it, the creditor is not prejudiced by a refusal of permission to take a copy thereof.

In re ALANSON H. TIFT.

A. C. Aubrey, for bankrupt.

C. H. Phelps, for opposing creditor.

BENEDICT, J.—This case comes before the court upon a motion to record a composition resolution.

It is founded upon the report of the register of the proceedings of the meeting of creditors in composition, by which it appears that the resolution was duly passed and confirmed by the requisite number of creditors.

To this report is attached the examination of the bankrupt had at such meeting at the instance of certain creditors, and also a further examination of the bankrupt subsequently directed by the court to be had at the instance of an opposing creditor, who claimed that his right to put inquiries to the bankrupt had been abridged by the action of the meeting of creditors in excusing the bankrupt from further attendance at such meeting.

Objection to the recording of the composition is now made by the creditor referred to upon two grounds: one that he has been improperly deprived of the right to examine the bankrupt, in accordance with the order of the court, by the refusal of the register, during such examination of the bankrupt, to proceed further without payment or security for his fees for such examination.

It has previously been decided by the court in this same proceeding that the expense of an examination of the bankrupt on composition proceedings must be borne in the first instance by the creditor making the inquiry.

It was therefore incumbent upon this creditor to comply with the direction of the court in regard to such expense, and the refusal of the register to proceed further without payment of his fees or security, full opportunity having been given to make such payment or deposit security before the closing of

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the examination, affords no ground upon which the creditor can base an opposition to the recording of the composition resolution.

The second ground of objection is that the register erroneously ruled that the opposing creditor was not entitled to take a copy of an invoice book, produced by the bankrupt and purporting to show the amount, description, and value of his assets, by which ruling it is insisted the creditor was prevented from ascertaining for his own information and from showing to the court the true amount and value of the property now possessed by the bankrupt. The report of the ruling objected to shows that the counsel for the opposing creditor desired to copy the inventory for the purpose of appraising the goods mentioned therein.

The register ruled that the bankrupt might be examined touching the goods, and the creditor might use the inventory upon the examination, but refused permission to take a copy of the inventory.

This ruling was objected to at the time, but no certificate was asked for, and the question is now first raised before the court upon this motion.

It was the duty of the creditor to have brought the question before the court by a certificate, and not to have waited until the examination has been closed and the case is before the court upon a motion to record the resolution.

In the second place, so long as the inventory was produced before the register and at all times made accessible to the creditor for the purpose of examining it or the bankrupt in respect to it, I see no prejudice to the creditor by the refusal of permission to take a copy.

My conclusion, therefore, is that no valid objection has been taken to the recording of the composition.

The composition sought to be effected was one proposed after a full examination of the bankrupt's affairs by a committee of the creditors, and in accordance with the views of the great mass of creditors, but a single creditor opposing.

The voluminous testimony taken fails to furnish any reason

In re Lissberger.

for doubting that it is for the best interest of all concerned that the composition be carried out.

The order will therefore pass directing that the resolutions be recorded.

UNITED STATES CIRCUIT COURT—S. D. NEW YORK.

Where debtors had excepted to a proof of claim at their composition meeting, and the court allowed the claim, and the creditor voted in favor of the composition,

Held, On a motion to compel debtors to pay the composition on this debt, that the amount claimed by the creditor in his proof of debt, although accepted by the creditors and the Court as the true amount due for the purposes of their action in the composition proceedings, does not conclude the debtors, and on this motion they may show, if they can, that it exceeds what they actually owe.

In re LAZARUS LISSBERGER.

THE facts fully appear in the opinion.

Melville H. Regensburger and *F. N. Bangs*, for Holmes & Lissberger.

Robt. D. Benedict and *James F. Malcolm*, for the receiver, Sinclair.

WAITE, CH. J.—This is a petition for review under the supervisory jurisdiction of this court in bankruptcy, and presents the following case: On the 9th of January, 1875, Lazarus Lissberger, one of the partnership firm of Holmes & Lissberger, composed of himself and Samuel Holmes, filed his petition in the District Court of this district for the adjudication of himself and his partnership as bankrupts.

In the schedules of the indebtedness of the firm attached to the petition, was a debt due Henry F. Hamill, about one hundred thousand dollars open account for goods, wares, and merchandise sold and delivered by said creditor to the firm of Holmes & Lissberger. Upon the filing of this petition, an order was made by the court upon Holmes to show cause,

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January 16, 1875, why the prayer should not be granted. No adjudication in bankruptcy has been made, but, March 27, 1875, while the petition was still pending undisposed of, Holmes & Lissberger applied to the court to call a meeting of their creditors to consider a proposition of compromise, and annexed to this application a statement containing the names of the creditors of Holmes & Lissberger, together with their several addresses. In this statement appeared the name of Hamill. The meeting asked for was duly called and held April 8, 1875, and, in accordance with the practice of the court which then prevailed, the deputy clerk of the court presided. The debtors appeared and made their proposition in due form. They also made a statement of their debts and assets as required by the act of Congress, and were sworn and examined. In this statement the name of Hamill was given as a creditor, but the amount represented as due does not appear in this case as now presented to this court. The meeting, although commenced April 8, 1875, was not concluded until August 14th. On the 12th of July, William Sinclair appeared as the representative of Hamill under an appointment as receiver, with authority to collect the debt, and offered a deposition for proof of claim amounting to one hundred and fifteen thousand four hundred and fifty-seven dollars and sixty-two cents. The debtors objected to the proof on the ground, among others, that there was no such sum due. July 21st, Sinclair, as receiver, filed with the deputy clerk a communication in writing, whereby he withdrew his request for the record of his vote against the resolution, and asked that it be recorded in favor. He at the same time withdrew his former deposition for proof, and accompanied his communication with another deposition. In this second deposition, it was stated that the firm was indebted to Hamill in the sum of one hundred and twelve thousand three hundred and fifty-five dollars and ninety-four cents, the particulars of which are as follows: 1. Eighteen promissory notes of Hamill, payable to the order of Holmes & Lissberger, amounting in the aggregate to one hundred and nine thousand nine hundred and twenty-nine dollars and eighty

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cents, loaned by Hamill to the partners for their accommodation, and used by them. 2. Goods sold and delivered at the agreed price of one hundred and forty-one thousand nine hundred and twenty-five dollars and fifty-one cents, against which the partners were entitled to credit, 1st, for goods, twelve thousand two hundred and sixty-eight dollars and sixty-one cents, and, 2d, for promissory notes made by Holmes & Lissberger, payable to the order of Hamill, amounting in the aggregate to one hundred and twenty-seven thousand two hundred and thirty dollars and eighty-four cents, which were loaned by the partners to Hamill for his accommodation, and used by him. The balance between the debit items in this statement and the credit items was the amount of the debt actually claimed to be due. Upon the presentation of this proof of debt, the creditors who opposed the composition objected to the claim, upon the ground, among others, that the receiver was not a creditor of the partnership to any amount whatever, and that it appeared on the face of the proof itself that he held security, the value of which had not been ascertained. Certain creditors further objected that Holmes & Lissberger, as sureties for Hamill on the notes which were primarily his own obligations, were, in the administration of their estate in bankruptcy, entitled to offset their liabilities as sureties against the purchase of iron set out in the proof. Holmes & Lissberger themselves objected to the proof upon the ground, among others, that the amount for which the proof was made exceeded the sum on which Hamill or his representatives would be entitled to a dividend, by at least fifteen per cent. on such part of the accommodation notes of Hamill indorsed by them as had already been proved or was provable in the proceeding. On the 22d of July, the deputy clerk declared that the proof of debt as presented was received, subject to the exceptions which had been made. He also further declared that Sinclair would be entitled to vote on account of the merchandise sold to the amount of one hundred and twenty-nine thousand six hundred and fifty-six dollars and ninety-six cents; but as he had only made proof for a claim to indebtedness of one hun-

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dred and twelve thousand three hundred and fifty-five dollars and ninety-four cents, his vote, when taken, would be considered taken at that sum. Holmes & Lissberger then objected to this ruling, on the additional ground that it did not appear upon the proof that Hamill or his representatives had a claim against them for the amount of one hundred and twelve thousand three hundred and fifty-five dollars and ninety-four cents, and also upon the further ground that they were not indebted to him in any such amount. Certain of the creditors then asked the deputy clerk to certify to the court the deposition for proof of claim by Sinclair in connection with the evidence of Holmes taken upon that subject in the composition proceedings, and they objected against the admission of Sinclair to vote upon the compromise. They also objected that upon the division of the estate of the firm by the assignee in bankruptcy, no sum of money would be distributed to the receiver upon a proper adjustment of the accounts, and that Holmes & Lissberger, in the distribution of their own estate, and the payment of their own debts, would not be bound to pay anything. They also objected that Holmes & Lissberger were not bound to pay Sinclair anything on account of goods sold, so long as they or their estate were left unprotected by him on the outstanding notes. It was conceded as a matter of fact that the holders of ten of the notes of Hamill, indorsed by Holmes & Lissberger, amounting in the aggregate to fifty-three thousand six hundred and thirty-five dollars and thirty-six cents, had been admitted as creditors, and the holders of nine of those of Holmes & Lissberger indorsed by Hamill, amounting in the aggregate to fifty-four thousand and forty-six dollars and ninety-three cents, had also been admitted. All these several matters were certified as requested by the creditors, and the court thereupon decided that there was no error in any of the rulings of the deputy clerk. This decision having been reported to the meeting of the creditors, in due course of proceeding the resolution accepting the composition was passed and signed by the requisite number and value of the creditors. Subsequently, upon the presentation of the

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resolution and the statement by the debtors of their assets and debts to the court, they were duly recorded and filed, August 31st. Holmes & Lissberger paid all their creditors the amount due them respectively, according to the terms of the compromise, except Sinclair.

He thereupon, on the 2d of February, 1876, presented his petition to the District Court, setting forth that after the proposition of compromise had been accepted by the creditors at the meeting called for that purpose and on the 18th of September, 1875, Holmes, one of the firm, filed in the clerk's office of the court a statement of the assets and debts owing by the firm, in which the claim of Hamill against the firm was set down at sixty-nine thousand nine hundred and eighty dollars; that he himself signed the compromise to accept fifteen per cent. on the amount due Hamill; that the amount was not stated at the time of obtaining his signature, and that he was not then aware of the facts and circumstances connected with the amount due Hamill; that the compromise was accepted and recorded; that the time of payment had passed, and no payment or offer of payment has been made to him; that it was within the power of Holmes & Lissberger to have given the exact figures and dates of the amounts due from them, as the indebtedness arose out of two transactions, and in the month of September, 1874, the amount due had been settled, adjusted, and agreed upon in writing, signed by both Hamill and the firm, at one hundred and four thousand dollars.

The prayer of this petition was for a reference to ascertain the amount due, and for the payment of the compromise percentage thereon, and that the firm might be directed forthwith to pay the percentage upon the amount admitted to be due from them in their petition and statement March 8, 1876, a reference was ordered in accordance with the prayer of the petition to take proof of the amount due and report thereon. December 18th, the commissioner to whom the reference was made reported, finding due Sinclair, as receiver, one hundred and eighteen thousand two hundred and fifty-eight dollars and sixty-six cents.

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To this report Holmes & Lissberger excepted on various grounds, but in effect because their indebtedness was only fourteen thousand two hundred and eighty-six dollars and forty-two cents. Before the hearing of their exceptions, the court being of the opinion "*that the amount of the debt due said William Sinclair was filed in the proceedings on the composition offered by said bankrupts at the sum of one hundred and twelve thousand three hundred and fifty-five dollars and ninety-four cents, in such wise that it cannot be now questioned by said bankrupts,*" adjudged that amount to be due without any inquiry into the objections urged against the report, and directed Holmes & Lissberger to pay into court the compromise percentage thereon, amounting to sixteen thousand eight hundred and fifty-five dollars and thirty-nine cents, with interest from October 1, 1875.

This order of the District Court is now here for review, and the single question presented is whether Holmes & Lissberger are barred by the proceedings in composition from showing in this suit that the amount they actually owed Hamill was less than the amount specified by Sinclair in his proof, and recognized by both the creditors and the court as the voting value of the debt for the purpose of their action when considering the propriety of accepting and confirming the composition. The act of Congress regulating proceedings in composition is an addition to and an extension of the relief granted by the original Bankruptcy Act. It must make no special provisions for proof of debts, although it calls largely for the action of creditors. The first thing to be done is for the debtor to ask the court in which his suit in bankruptcy is pending to call a meeting of his creditors. Notice of the time, place, and purpose of such a meeting must be given to all creditors who are known. "The creditors assembled on such a call may resolve to accept the composition offered by their debtor in satisfaction of his debts, but their resolution to be operative must be passed by a majority in number and three-fourths in value of the creditors present, either in person or by proxy, and confirmed by the signatures thereto of the debtors and two-thirds

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in number and one-half in value of all the creditors of the debtor. In calculating the requisite majorities, creditors whose debts amount to sums not exceeding fifty dollars are to be reckoned in the majority in value, but not the majority in number, and the value of the debts of secured creditors above the amount of the security, to be determined by the court, must, as near as circumstances admit, be calculated in the same way. The debtor, unless prevented by sickness or other cause satisfactory to the meeting, must be present and answer any inquiries that may be properly made of him. He or some one in his behalf must produce to the meeting a statement showing the whole of his assets and debts and the names and addresses of the creditors to whom the debts are respectively due." "The resolution, if passed and confirmed, must be presented to the court, together with the statement of the debtor as to his assets and debts, and the court, upon notice to all the creditors of the debtor, and upon hearing, must inquire whether the resolution has been passed in the manner directed by the act. If satisfied that it has been so passed, and that it is for the best interest of all concerned, the court must cause the resolution to be recorded and the statement of the debts and assets to be filed. The composition then becomes binding on all the creditors whose names and addresses and the amounts of the debts due to whom are shown in such statement. Any mistake made inadvertently by a debtor in the statement of his debts may be corrected upon reasonable notice and with the consent of a general meeting of his creditors."

From this recapitulation of the provisions of the act, it is apparent that, to some extent, both the creditors and the court must depend upon the debtor for information as to the names of his creditors and the amounts due them respectively. Creditors need not prove their claims in bankruptcy unless they wish to take some action in the progress of the bankruptcy suit or share in the distribution of the estate, but in composition proceedings the debtor is the moving party. He seeks relief from his debts by the payment to each of his creditors of a part of what he owes them respectively in satisfaction of the whole.

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It is optional with a creditor to act or not. If he fails to act, his non-action is equivalent to a positive vote against what the debtor wants, and is to be reckoned as such. But the debtor seeks relief against him as much as against others, and if the requisite majorities are found to be in favor of accepting and confirming the proposition, he is bound equally with those who have given the affirmative votes, if his name and address and the amount of his debt are included in the statement of the debtor. As soon as the creditors come together under the care of the court, they may require the debtor to present his statement of assets and debts. What both they and the court want to know is, 1st, whether the debtor has offered all he can afford to pay, and 2d, what effect is to be given each vote in calculation of the requisite majorities. When the statement is made, each creditor present can tell for himself whether the amount due him is set forth correctly, and if errors are discovered or suspected, the debtor is there to answer such inquiries as may properly be put to him upon the subject. Should disputes arise between the debtor and particular creditors, or should there be a suspicion of collusion, it would no doubt be competent and quite proper for the court to require proof of debts by creditors, in accordance with the provisions of the General Bankrupt Law upon that subject. When the evidence of both sides is all in, the representative of the court who presides at the meeting may, if necessary, decide as to its legal effect; but as the court has supervisory jurisdiction over him, it is always in the power of the dissatisfied parties to obtain a review of his rulings. In this way, when disputes of this character arise, the court may be called upon to determine what ought to be done under the circumstances of the case. Sometimes it may be necessary to have the amount due definitely settled, either by the agreement of parties or judicial decision, before final action upon the compromise is taken, and at others it may be sufficient to fix the value of the debt for the purpose of such action as the creditors and the court are required to take in considering the opposition, and leave the parties to their appropriate remedies for ascertaining the amount to be paid, if the compo-

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sition eventually becomes binding. All such matters may properly be left to the judicial discretion of the court. If it seems to be important that the creditor or the court should know the exact amount due before taking their final action, an appropriate order to that end may be made; but if the matter in dispute is not such as materially to affect the result, or it is for the interest of all that the composition should be acted upon before an adjudication of the controversy as between the parties themselves can be had, nothing more need be done than to give such directions for the government of the proceedings as will protect the parties from harm, notwithstanding the existing uncertainty as to the amount that is due. An assignee in bankruptcy is chosen by the greater part in value and in number of the creditors who prove their debts. (Rev. Stat., Sec. 5034.) In making this choice, questions not unfrequently arise as to the rights of a particular creditor to vote, and as to the value a debt is to have in the calculation of the majority. When such questions do arise, they may be referred to the court for settlement, but I think it has never been supposed that what was then done would ordinarily preclude either the assignee, when chosen, or the bankrupt or the creditor from instituting a further inquiry, under the provision of Sec. 5081, as to the validity of the claim or the amount due. Proceedings for the choice of an assignee are rarely if ever stopped until the merits of a claim are adjudicated upon.

It is sufficient if the court fixed its voting value for the time being. Thus, if a secured creditor whose debt is partially secured proves his unsecured balance, and the bankrupt or the other creditors are not satisfied with the value he puts upon the security, the court need not delay the election until the actual value can be ascertained by a sale, but may estimate the amount and order the vote to be counted accordingly. So, too, if there are mutual debts, and the balance stated by the creditor in his proof is disputed, the court may fix the value for the matter in hand, and leave the parties to litigate further, if they choose, for the purposes of the distribution of the estate or any subsequent proceedings. The same practice is clearly ap-

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plicable in cases of composition, and seems to be recognized in that portion of the act which requires the court to determine the value of the debts of secured creditors above their security in estimating majorities under the General Bankrupt Law. If a secured creditor seeks to be admitted as a creditor for the balance of his debts over his security, the value of the security may be ascertained by agreement between himself and the assignee, or by a sale in such manner as the court shall direct.

The special provision in the composition act was not intended as a substitute for this part of the general act, but to show in what manner the vote of this class of debts was to be estimated in the proceeding preliminary to the composition. The object was not to ascertain as between the debtor and the creditor how much was to be paid under the composition, but what influence the particular debt was to have in the deliberation of the creditors or upon the action of the court. In cases of composition no dividend is paid to creditors. The debtor offers a *pro rata* payment in proportion to the amount of his unsecured debts. If the offer is accepted, the payment is for the satisfaction of the debts, and not as a dividend from the estate in bankruptcy. When the satisfaction is complete, the debtor is free to dispose of his estate as he will. His creditors, therefore, are not interested in the amount of his debts, except as far as it may affect his ability to pay or the votes which are to be taken. In regular bankruptcy, however, when the estate of the bankrupt is distributed to the creditors in proportion to the amount of their respective debts, the case is different. There each creditor is directly interested in the amount due to another, and ample provision is made for a contest in this behalf by the assignee, the creditor, or the bankrupt. (Sections 5081, 4980.) No time is limited for the institution of such a proceeding. The necessary application may be made at any time before the final dividend. Undoubtedly all this machinery of the Bankrupt Law may be used by the court in composition proceedings for the purpose of obtaining accurate information before deciding to accept or reject the offer of the debtor, but there is nothing in the law which requires it to be done.

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After the composition has become binding, the court has full power *to enforce it on motion made in a summary manner by any person interested and on reasonable notice*. Under this power ample opportunity is afforded for the settlement of all controversies between the debtor and his individual creditors. If the other creditors and the court are fully informed of the fact that there is a dispute between the debtor and his creditor as to the amount that is actually owing, and of the claims of the respective parties before their final action is taken which gives effect to the composition, they cannot complain if, when called upon to pay, the debtor insists upon what he claimed, while they were acting, were his rights in the premises. This is not a proceeding to set aside a composition, but to enforce it; not to determine whether this composition is binding upon this particular creditor because the amount due him was not correctly set forth in the debtor's statement produced at the meeting of the creditors, but to require the debtors to pay what they have offered. The question presented is not as to the effect of an error by the debtor in his statement of debts upon the validity of the composition, but whether the debtor, when his statement is disputed by the creditor at the time and a large amount claimed as due, may resist the claim of the creditor upon the motion of that creditor to have the composition carried into effect. The language of the offer in the case as accepted was *to pay our several creditors the sum of fifteen cents in money on every dollar owed by us to our creditors, without any interest calculated on the principal sum of our indebtedness*. If this were all, it is clear that in this action the first thing for the court would be to settle the dispute between these parties as to the amount of the debt. The offer was to pay a percentage upon what was owing, and in this case that amount was not stated. This makes it necessary to inquire whether what was done at the meeting of the creditors and by the court has the effect of a judicial determination of the controversy. All that appears upon this subject in the record is that the debtors in their statements reported a debt owing to Hamill, but from what is said in the argument of

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their counsel here, it may fairly be inferred that they were uncertain as to its amount. Sinclair appeared for Hamill at the meeting of the creditors and offered a deposition to prove the amount. His claim as stated in the proof was disputed by the debtors and some of the creditors. They insisted that nothing was due, or, if anything, not so much as he demanded. The proof of debt was received subject to exceptions, and, after the evidence of one of the debtors was taken, the officer presiding at the meeting ruled that Sinclair was entitled to vote, and that his vote when taken would be considered as taken upon one hundred and twelve thousand three hundred and fifty-five dollars and ninety-four cents. Upon the reference of the proof of claim and the evidence of the debtor to the court, the ruling of the presiding officer was confirmed. This is all that transpired upon this subject previous to the adoption of the resolution of acceptance at the first meeting of the creditors, so that the debtors always contended that they did not owe as much as Sinclair claimed. When Sinclair signed the resolution of acceptance for the purposes of its confirmation, as required by the law, the amount due him was not stated, and there is nothing to show that this omission was ever supplied. As this instrument was to be signed by both the debtor and the opposing creditors, it is not improbable that the amount was properly withheld, because the debtors were unwilling to commit themselves to the amount as claimed by Sinclair, and he was unwilling to bind himself in that way to accept the composition percentage upon anything else. From all this it seems to me clear that neither the parties nor the court understood that any other question was submitted for judicial determination than the value which should be given the debt by the creditors and the court, when considering the propriety of accepting or confirming the composition. The debtors evidently so understood it, because they did not ask the court to pass upon the ruling of the presiding officer. They contented themselves with their exception upon the record, thus indicating their unwillingness to be bound for the payment of their proposed percentage upon the amount claimed, but consenting that the meet-

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ing should proceed with its business under the ruling as made, without further opposition so far as they were concerned.

Sinclair must have also so understood it when he called upon the court to enforce the composition in his favor; he did not ask for the percentage upon the amount for which his note was taken, but prayed for an account of the amount actually his due, and the payment of the sum he was entitled to calculate upon that basis. The other creditors, as has been seen, are not interested, because, notwithstanding they were freely advised as to the controversy in respect to this particular debt, they voted to accept the proposition and affixed their confirmatory signatures. The court, too, cannot have been misled, because, when called upon to cause the resolution of acceptance to be recorded, the amount due Hamill was left blank in the instrument containing the signatures of those who confirmed the resolution, although Sinclair, his representative, appeared as one of the signers. From this it may fairly be inferred that the resolution was passed and confirmed without the vote of Sinclair, and that, so far as the other creditors were concerned, it was immaterial whether the amount due upon this debt was definitely settled or not. If, instead of taking the vote of Sinclair and counting it at the value he put upon his claim, it had been counted under a similar order of the court, and against his protest, at the amount fixed by the debtors, I cannot believe it would be seriously contended that he was bound to accept in satisfaction of his debt the percentage upon the amount thus treated as due. But if the creditor is not bound, neither is the debtor. A judgment, or that which is the equivalent of a judgment, binds all the parties or none. Upon the whole, I am clearly of the opinion that the action of the court during the progress of the composition proceedings was not an adjudication of this debt as between the debtors and creditors, but only an estimate of the amount at which the debt was to be reckoned in calculating the majority under the law.

The order of the District Court, fixing the amount due at one hundred and twelve thousand three hundred and fifty-five dollars and ninety-four cents without inquiring into the ob-

Robinson, Assignee, etc., v. The Wisconsin Marine & Fire Insurance Co. Bank.

jections urged by Holmes & Lissberger is reversed. No other questions are decided. I have not inquired into the merits of the case, neither have I considered the effect of anything that may have been contained in the statement presented by the debtors to the meeting of the creditors or to the court. I have only decided that the amount claimed by Sinclair in his proof of debt, although accepted by the creditors and the court as the true amount due for the purposes of their action, does not conclude the debtors, and that in this action they may show if they can that it exceeds what they actually owe, and upon which alone they are bound to make payment under the composition. The costs in this court must be paid by Sinclair, the receiver.

UNITED STATES CIRCUIT COURT—E. D. WISCONSIN.

SEPTEMBER, 1878.

The defendant bank was a creditor of the bankrupt by note of four thousand dollars, and was at the same time indebted to the bankrupt on deposit account to the amount of four thousand five hundred dollars. Prior to proceedings in bankruptcy, and on the day before the maturity of the note, the defendant, having knowledge of the insolvency of the bankrupt, received from the bankrupt a check for four thousand dollars, and thereupon surrendered the note, and by the transaction to that extent reduced the amount of the deposit account, in favor of the bankrupt, upon the books of the defendant.

Held, That the transaction was an adjustment of mutual debts within the meaning of Section 5073, Rev. Stat., and not a fraudulent preference within the meaning of Section 5128.

ALMANZO ROBINSON, Assignee, etc., v. THE WISCONSIN MARINE AND FIRE INSURANCE COMPANY BANK.

In 1875, and prior to the sixth day of August in that year, the Corn Exchange Bank was a private banking concern, owned by Wm. Hobkirk, and doing business at Waupun in this State. Hobkirk was the cashier, and C. W. Henning was the teller of

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the bank. On the sixth day of August, Hobkirk absconded, taking with him the larger part of the funds of the bank.

On the 13th day of September, 1875, on petition of creditors, the bank was adjudicated bankrupt, and the plaintiff was subsequently appointed assignee. From the 1st of May, 1875, until the Corn Exchange Bank ceased to do business it had an account with the defendant, the Wisconsin Marine and Fire Insurance Company Bank, the defendant in this action, the two banks having mutual dealings, and the bankrupt having a debit and credit account upon the books of the defendant. It was the custom of the defendant bank to receive from the cashier of the bankrupt, in the course of their interchange of business, notes for collection and discount, which were placed to the credit of the bankrupt, and the proceeds of which were held subject to draft; among which notes so discounted by the defendant was paper from time to time executed by Hobkirk and indorsed by him as cashier, and, when discounted by defendant, placed to the credit of the Corn Exchange Bank, and then received by that bank from the defendant and held for collection in due course of business as it should mature.

On the 12th of May, 1875, the Corn Exchange Bank, through its cashier, executed and delivered to the defendant a promissory note made by Hobkirk, payable to the order of the Corn Exchange Bank, and on that day by him as cashier indorsed and delivered to defendant, for the sum of four thousand dollars, due in ninety days; and thereupon the defendant discounted the note and placed the amount thereof on its books to the credit of the Corn Exchange Bank, and forwarded the same to that bank for collection. It was not disputed that the indebtedness to the defendant, created by the transaction for the amount of the note, became a liability of the Corn Exchange Bank, and it was so treated on the trial. This note became due on the tenth day of August, with three days of grace thereafter. The Corn Exchange Bank continued to do business until the tenth day of August, 1875, when the amount to its credit on the books of the defendant was four thousand five hundred and twenty-six dollars and sixty-one cents. On

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the ninth day of August, in an interview between the cashier of the defendant bank and the teller of the Corn Exchange Bank, the condition of the latter bank was communicated to the cashier of the defendant, and thereupon, on his request, the teller of the Corn Exchange Bank delivered to the defendant's cashier a check upon the defendant bank for the amount of the four thousand dollar note, dated as of August 10th, which was charged to bills payable on the books of the Corn Exchange Bank, and credited to the defendant. Entry of the transaction being made upon the books of the defendant bank, there still remained to the credit of the bankrupt, in the possession of the defendant bank, five hundred and twenty-six dollars and sixty-one cents, which, on demand of the assignee, was subsequently paid to him. Upon the making of the check before mentioned, the note for four thousand dollars was surrendered to said Corn Exchange Bank. The present action was brought by the assignee to recover from the defendant bank the amount for which it received the check of the bankrupt, in manner before stated, with interest from the tenth day of August, 1875.

E. M. Beach and E. P. Smith, for plaintiff.

Finches, Lynde & Miller, for defendant.

DYER, J.—At the time of the transaction in question, the Corn Exchange Bank was indebted to the defendant bank in the sum of four thousand dollars, the amount of the note which the latter bank had discounted. The defendant bank was at the same time indebted, on open account, to the Corn Exchange Bank, in a sum exceeding the amount of the note. The transaction took place on the day before the note matured; the note falling due August 10th, with three days of grace thereafter. The Corn Exchange Bank was insolvent, and this fact was brought to the knowledge of the defendant's cashier at the time he received the check for the amount of the note. It is contended by counsel for the assignee that the transaction was a preferential payment to the defendant within the provisions

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of Section 5128, Rev. Stat., and therefore in fraud of the Bankrupt Act; that, as a consequence, the assignee may recover for the benefit of general creditors the amount so alleged to have been paid to the defendant.

It is contended by counsel for the defendant that the case is one of mutual debts between the parties; that, therefore, one debt could be set off against the other, within the provisions of Section 5073, and that consequently the transaction was in fact nothing more than an exercise of the right of set-off given by this section, and it is not within the condemnatory provisions of Section 5128. Section 5073 declares that, in all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid. In view of this provision of the law, there can be no doubt that if the transaction as stated had not occurred between the parties, and the matter had been, subsequent to the adjudication in bankruptcy, brought to the court for adjustment, it would have directed an account between the parties to be stated, and would have ordered, as authorized by Section 5073, one debt set off against the other. Disregarding matters of form which I deem immaterial, the question is, whether the transaction between the parties was not in substance and in fact an exercise of the right of set-off within the meaning of the statute; and if this be so, whether the court can declare it illegal, because the adjustment was thus made by the parties before the adjudication, instead of by the court after adjudication. Here was a plain case of mutual debts between the parties. Hardly a clearer case for application of the statute could arise. Why should it be necessary, when the account was already stated, disclosing the fact that the defendant bank owed the Corn Exchange Bank four thousand five hundred and twenty-six dollars, and that the latter bank owed the defendant bank four thousand dollars, that the parties should await future proceedings in bankruptcy and call upon the court to do that which they could as completely do?

In the language of the court in a case to which I shall

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refer, "Suppose that the adjustment of these debts had not been made till after the adjudication of bankruptcy; we have seen that by the very words of the act it could then be made. And the result would be exactly the same in either case. Shall the court condemn a man for doing what the court itself does?" Upon the argument, the form of the transaction was dwelt upon, namely, that a check was drawn and given for the amount of the note, and that the parties spoke of it, in the course of their interview, as a payment. But we are not to sacrifice substance to form, but rather to go beyond the mere form and see what the substance and effect of the transaction was. And doing so, we find that it was in fact an adjustment of mutual debts, and this was what the parties intended to accomplish. Ought the court to put aside the true meaning and effect of the transaction, and adjudge it to have been technically a payment because the form of a check was employed, and, as a consequence, declare that which was in reality a setting off of a portion of the deposit against the amount of the debt evidenced by the note, to have been unlawful? I think not.

But it is said that the note was not due when this transaction occurred, and it is true that it took place on the 9th of August, and the note was not due till the 10th, with three days of grace, according to the law merchant, thereafter to run. But there existed an indebtedness at the time, and though payment of the note could not by process of law be enforced on the 9th, yet I do not see why the parties could not then deal with it as an existing debt, nor why the circumstance that an adjustment was made the day before the note became due should make it unlawful, nor how any injury could in consequence result to creditors. Suppose the note had been one that had five years to run, and after adjudication in bankruptcy the court had been applied to, to make an adjustment between the parties. Could not an account have been stated and one debt set off against the other, and the balance allowed in favor of the bankrupt? That it could would seem hardly disputable.

It is further suggested that, in giving effect to the statute,

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the account between the parties must be stated, and the set-off allowed by the court, and that neither of these acts can be done by the parties in advance and independent of the court. Undoubtedly, cases may arise in which it is necessary to appeal to the court for a statement of mutual accounts and for an adjustment of such set-off as may be claimed. But if the account is truly stated by the parties themselves, and a correct adjustment is made, so that the same result is attained as would be reached by the court, and nobody is or can be injured, I do not see that it can reasonably be insisted that the parties may not do what otherwise the court would do.

The case of *Hough v. First Nat'l Bank of Fort Wayne* (4 Biss., 349) is precisely in point, except that in that case the transaction was had on the day the note on its face became due, exclusive of the three days of grace. In that case, the bankrupts delivered to the officer of the bank a check on the bank for the amount of their deposit, and this was credited on the note which the bank held against the bankrupts. At the time of the transaction the officers of the bank knew that the bankrupts were insolvent. It was held by the court, that the case was one of an adjustment of mutual debts, and not a fraudulent preference within the meaning of the Bankrupt Law.

The point was urged that the transaction could not be a set-off of mutual debts, because the note was not due at the time; but the court said the makers of the note had the right to settle or pay it on the day it was by its face due, though payment could not be demanded till the third day thereafter; the judge further observing that he could not concede that if the note had not matured, the adjustment would have been unlawful, as preferring a creditor.

Other remarks by Judge McDONALD in his opinion are directly applicable to the case at bar, namely, that if this transaction had never happened and these mutual debts had remained *in statu quo* till the debtor was adjudged bankrupt, the court would have applied the deposit on the note by way of set-off, precisely as the parties have done. "And the assets to

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be distributed among the creditors would have been exactly the same as they will be, if we allow the transaction under consideration to be valid. In either case the distributive share of each creditor will be precisely the same; consequently, no creditor can be injured by the transaction, and no fraud can be perpetrated by it."

Strong support for the view I take upon this question is, I think, to be found in the case of *Winslow, assignee, v. Bliss* (3 Lans., 220). The case is well stated in the head-notes. An individual banker discounted a note belonging to and indorsed to him by a firm, and placed the avails to its credit. Afterward, when the liability of the firm as indorser had been fixed, and on the day before suspension of payment by the banker, he charged the note to its account, and thereby, excepting a small balance in the firm's favor, balanced its deposit account with him, and redelivered the note, which the firm accepted in satisfaction of its deposits. *Held*, That the surrender of the note gave no preference to the firm within the Bankrupt Act; that the firm was entitled to have its deposits applied to the satisfaction of its liability upon the note under the section of the law which provides for the case of mutual debts or mutual credits, and the parties having done precisely what the law would otherwise have compelled the plaintiff as assignee to do, there could be no recovery. It is true that in this case the note had matured when the transaction took place; but I do not regard that circumstance as materially affecting its application to the case at bar.

Other cases to some extent bearing upon the question under consideration are: *In re Farnsworth, Brown & Co.* (14 N. B. R., 148, 5 Biss., 224), and *Blair v. Allen* (3 Dillon, 101).

The case of *Traders' Bank v. Campbell* (6 N. B. R., 353, 14 Wall., 87) is invoked in support of the plaintiff's right to recover. But I am of the opinion that it ought not to be regarded as ruling the case at bar. In that case, the debtors of the bank gave to the bank their note for the whole amount of their debt, with a warrant of attorney to confess judgment. On the next day the bank deducted from the note three hun-

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dred and twenty-five dollars and twenty cents, an amount which the debtors then had in deposit account with the bank, and entered judgment in the State Court for the balance of the note. For the three hundred and twenty-five dollars and twenty cents, the debtors drew a check in favor of the bank, in virtue of which that amount was indorsed on the note before judgment. Execution was immediately issued on the judgment, and property of the debtors was levied upon and sold. At the same time the bank caused to be sold, under the same execution, a certain sum which it had received by way of collections, made by it in the ordinary course of business, of drafts belonging to the firm. Meantime proceedings in bankruptcy were commenced against the debtors, and subsequently Campbell, the assignee in bankruptcy, brought action against the bank to contest the validity of these transactions. The Supreme Court held the judgment obtained by the bank to have been an unlawful preference; also that the levy of execution upon money received as collections by the bank for the bankrupts amounted to a fraudulent preference, although the court say in their opinion, that if the bank had retained these moneys and appropriated them "as a set-off against the debt of the bankrupt, an interesting question might have arisen as to their right to do so." Effort was made in the case to have the sum of three hundred and twenty-five dollars and twenty cents, which the debtors had on deposit in the bank when the judgment note was given, and which was indorsed on the note by virtue of the debtor's check, declared, to the extent that it was so applied, a valid set-off; but this was not permitted, and it was held to be a payment by way of preference and not to raise the question of set-off. The point is not much discussed in the opinion of the court, and it is not clear that the court meant to declare a proposition broad enough to support the theory of counsel for the plaintiff, in the case at bar.

It seems hardly possible that the mere circumstance of taking a check was regarded by the court as giving to that particular branch of the transaction the character of a preferential payment and as destroying the right of set-off. And yet the

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form of the transaction in this respect is somewhat prominently alluded to. It seems to have been the view of the court, that the bank did not stand on its right of set-off, but, as is said in the opinion, endeavored to secure an illegal preference by getting the bankrupts to make a payment in the one case, and by seizing their property by execution in the other, when its officers knew of the insolvency, and that therefore both appropriations were void. And in my judgment, in reading the opinion of the court, that part of this case in which the question of set-off is raised is to be considered in connection with the other branches of the case. Taking the whole case together, there was evidently a flagrant attempt on the part of the bank to obtain fraudulent preferences; and the several transactions between it and the bankrupts, which gave rise to the subsequent controversy, were so intermingled that the court seem to have found it necessary to condemn the whole as amounting to a fraudulent and unlawful proceeding. In view of the peculiar state of facts existing in *Traders' Bank v. Campbell*, I am not satisfied that it rules the case at bar, and I cannot yield my conviction upon the question at issue, except upon clear authority. To what extent, moreover, the doctrine in *Traders' Bank v. Campbell* may have been modified by subsequent decisions of the Supreme Court, which have admonished the Circuit and District Courts that in some instances they have advanced quite far enough in their construction of provisions of the Bankrupt Act relating to preferences, may be an inquiry not devoid of pertinency.

Judgment for defendant.

NOTE.—On rehearing before Mr. Justice Harlan, the conclusions arrived at in the foregoing opinion were concurred in by him.

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UNITED STATES DISTRICT COURT—S. D. NEW YORK.

SEPTEMBER 8, 1878.

Fiduciary debts are discharged by a composition in bankruptcy.

*In re JANE C. RODGER and JAMES WARDROBE.**Charles Wehle*, for motion.*Gray & Davenport*, contra.

CHOATE, J.—This is a motion to dissolve an injunction by which a judgment creditor of the bankrupts has been restrained from arresting the bankrupt, Wardrobe, on execution.

A creditor's petition was filed July 10, 1878, and there has yet been no adjudication, but proceedings for a composition are now pending. The judgment was for goods sold and delivered, and the proceedings that have been had in the State Court amount to an adjudication, conclusive in this court, that the plaintiffs were induced by the false and fraudulent representations of Wardrobe as to their financial condition to sell the goods to the alleged bankrupts. The point to be determined turns upon the question whether this debt as against Wardrobe will be released in case the composition is accepted and confirmed. (*In re Shafer*, 17 N. B. R., 116.)

The affidavits certainly do not make out a case for a stay of execution against Wardrobe, if the claim against him will not be discharged, for though they show the opinions of the affiants that Wardrobe's personal attendance on the business is at present necessary in order that the debtors may realize on their stock of goods so as to pay the composition, they show no facts from which the court can properly draw the same conclusion, if it were proper to stay execution on such a ground.

The authorities on the question whether debts created by the fraud or embezzlement of the bankrupt, or contracted by him while acting in a fiduciary character, are discharged by proceedings for a composition, are conflicting. The Supreme

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Judicial Court of Massachusetts and the General Term of the New York Supreme Court have decided that they are not discharged. (*Mudge v. Wilmot*, N. Y. Daily Reg., Aug. 1, 1878; *Libbey v. Strasburger*, 17 N. B. R., 468.) The Supreme Court of New Hampshire, the United States District Court of New Jersey, and the General Term of the New York Common Pleas hold that they are discharged. (*Wells v. Lamprey*, 16 N. B. R., 205; *In re Schafer*, 17 Id., 116; *Bamberg v. Stern*, 18 Id., 74.) The case of *Ex parte Halford* (L. R., 19 Eq., 436), cited in *Mudge v. Wilmot*, seems to have no bearing on the question, because it is expressly provided in the English Bankrupt Law that the debtor shall remain liable on the unpaid balance of such debts. (Stat. 32 and 33 Vict., Chap. 62, Section 15.) The Bankrupt Law of 1867 provided no measures for a composition between the debtor and his creditors, but provided for proceedings for the discharge of the debtor on his application to the court therefor, and by Section 33 it was provided "that no debt created by the fraud or embezzlement of the bankrupt or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged *under this act*; but the debt may be proved and the dividend thereon shall be a payment on account of said debt; and no discharge granted under this act shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety or otherwise. And in all proceedings in bankruptcy commenced after one year from the time this act shall go into operation, no discharge shall be granted to a debtor whose assets do not pay fifty per centum of the claims against his estate, unless the assent in writing of a majority in number and value of his creditors, who have proved their claims, is filed in the case at or before the time of application for discharge."

Section 43 contains provisions for the estate being wound up by trustees under direction of a committee of the creditors, if the creditors at a meeting should, by a certain majority vote, so resolve and the court should approve. This section, however, expressly provided that in such case the winding up and

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settlement should be deemed "proceedings in bankruptcy under this act," and that the debtor might apply for and obtain a discharge as if the resolutions had not been passed, etc."

The amendatory act under which composition proceedings are taken was passed June 20, 1874, and is entitled "an act to amend and supplement an act, etc., and for other purposes."

Section 17 provided as follows: "That the following provisions be added to Section 43 of said act; that in all cases of bankruptcy now pending or to be hereafter pending, by or against any person, whether an adjudication in bankruptcy shall have been had or not, the creditors of such alleged bankrupt may at a meeting, etc., resolve that a composition proposed by the debtor shall be accepted in satisfaction of the debts due to them from the debtor." It contains specific directions as to the majority required for the adoption of the resolutions and for an inquiry by the court whether it is for the best interest of all concerned. It also provides for the production by the debtor of "a statement of the whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due," and also declares that "the provisions of a composition accepted by such resolution in pursuance of this section shall be binding on all the creditors whose names and addresses and the amounts of the debts due to whom are shown in the statement of the debtor produced at the meeting, etc., but shall not affect or prejudice the rights of any other creditors." The original Bankrupt Law was embodied in the Revised Statutes passed June 22, 1874, and by Section 5117 it was provided "that no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation, etc., shall be discharged *by proceedings in bankruptcy*; but the debt may be proved and the dividend thereon shall be a payment on account of the debt."

No inference, however, can be properly drawn from the substitution of the words "by proceedings in bankruptcy" for the words used in the original act "under this act" that it was adopted with reference to the amendment of the Bankrupt Law by the Act of June 20, 1874 or was intended to enlarge

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the scope of this section so as to include cases arising under the Act of June 20, 1874, because the Revised Statutes (Section 5601) expressly provided that "the enactment of the said revision is not to affect or repeal any act of Congress passed since December 1, 1873, and all acts since that date are to have full effect as if passed after the enactment of this revision; and as far as such acts vary from or conflict with any provisions contained in this revision, they are to have effect as subsequent statutes and as repealing any portion of the revision inconsistent therewith." The Revised Statutes are in fact to be regarded as a statute passed on the first day of December, 1873, and upon this question are only entitled to such weight as they may properly have—as a statute *in pari materia*, and as such throwing light on the general legislative purpose and policy touching the subject-matter. The change made in embodying the original Bankrupt Law into the Revised Statutes was necessary, or some change of phraseology was necessary, because the words "under this act" were no longer appropriate, and although the words to be substituted might have been "under this title," yet there is nothing to indicate that the words adopted as a substitute were intended to make any change in the meaning of the statute.

The Revised Statutes were intended to be in a strict sense a revision of existing statutes and the presumption is against a change in meaning from a mere verbal change, where the old phraseology could not be retained and the words substituted may have been used with like intent and meaning. (See Section 5595.) This explanation seems necessary, because in the case of *Mudge v. Wilmot* the opinion of the court seems to proceed in part at least on the words thus introduced by the Revised Statutes into Section 33 of the original law, as if the language of the Revised Statutes was to have the force on a question of construction of a contemporaneous or subsequent act. In fact, for all purposes of construction, the Act of June 20, 1874, is subsequent to the Revised Statutes, and as the latest expression of the legislative will, controlling if unambiguous.

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It may, I think, be assumed, then, that the change of phraseology in the Revised Statutes is unimportant, and that the question, as a question of construction, must be determined by the language of the original act, and the Amendatory Act of 1874.

Looking at the provisions of those two acts, it seems to me that fiduciary debts are released by composition proceedings under the 17th section of the Act of 1874. It is obvious enough that creditors of this description are within the class of creditors referred to in that section under the terms "*each known creditor*" "*all the creditors of the debtor.*" Indeed it has not been contended that they are not included within the section for the purpose of their being included in the statement to be produced by the debtor, and of obtaining a payment equally with other creditors out of the estate, but it is insisted that they take such payment as a dividend only, leaving their debts undischarged as to the balance. It is to be observed that this class of creditors are clearly within Section 43 of the original act to which the provisions of Section 17 of the Act of 1874 are by the terms of that section "added."

But if they are within the meaning of this composition section at all, how can it be said that the resolution is in any sense whatever "*binding*" on them, unless the composition satisfies and releases their claims? If they were included for the purpose of receiving a *pro rata* share with other creditors, but, as is claimed, not for the purpose of having their debts satisfied or released, the composition might in some sense be said to be binding on the debtor, but it could not be said to be "*binding*" on them.

There is nothing in the act to show a purpose to exclude this class of creditors from the composition. Indeed the contrary is so clear that in the discussion of this question that theory has not been proposed.

The provision as to creditors not named in the statement is evidently intended to guard against careless omissions on the part of the debtor, and it may well be doubted whether a composition was good where the omissions were so many as to show

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that the statute was not being used in good faith by the debtor to effect a compromise *with all his creditors*, according to its evident scope and spirit; whether by an artful selection of creditors to be notified and creditors to be omitted he could get rid in this way of a part only of his debts.

It is said, however, that the Act of June 20, 1874, being an amendment of the Act of 1867, the words "no debt shall be discharged" under this act in the 33d section of the Act of 1867 become operative by their own force upon every part of the act as amended, and that so they have in reality the same legal effect as the more general words in the Revised Statutes, "no debts shall be discharged by proceedings in bankruptcy" if the Revised Statutes were controlling on the question, and it is further urged that it was the evident policy of the Act of 1867, shown by many of its other provisions, as well as the one now in question, that it was designed for the relief of honest debtors, and that the release of debts fraudulently contracted was contrary to the evident policy and purpose of its framers.

As to the first of these suggestions it is to be observed that the words "discharged under this act" and the words of the Revised Statutes "discharged by proceedings in bankruptcy" had primarily reference, when used in those statutes respectively, to peculiar proceedings for a discharge provided for in those statutes respectively, and were not, when so used, used with reference to an entirely different kind of proceeding not then in existence, and whether or not on an amendment of the statute these words shall have the force and effect to cover and embrace a new and different kind of discharge, introduced into the act by the amending statute, depends upon whether the language of the amending act can be fairly reconciled with such a purpose.

If full and fair effect can be given to all the provisions of the subsequent act, consistently with such purpose, then the principle which requires the whole act as amended to be read as far as possible as a single enactment would extend the words of the original act to the new but similar case provided

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for in the amending act, though that new case was not within the purview of the framers of the original act.

But where, as in this case, the terms of the subsequent act are unambiguous, and are clearly inconsistent with such purpose, and can have no meaning if the words of the original act are deemed so extended as to cover this new case, then such construction is impossible, and violates that rule of construction which requires due force and effect to be given to all parts of a statute, and also that obvious rule of construction which makes the latest declaration of the legislative will controlling over an earlier declaration of the same will.

Now, in this case, it seems to me that the terms of the Act of 1874 are clear and unambiguous, and would be in fact and in effect annulled and made meaningless by giving the extension and force to the words of the earlier statute here contended for.

Those words cannot be taken, therefore, by construction to be so enlarged, but must be held to refer to what they referred to in the original act, the discharge thereby provided for.

The other suggestion of the general policy of the Bankrupt Law would be entitled to great weight in a doubtful question of construction.

In the interpretation of contemporaneous statutes, this suggestion is entitled to its greatest weight, but where the statutes in *pari materia* are passed at a considerable interval of time, there is always the possibility of a change in the policy which actuates and governs legislation on a given subject; and if the later statute is unambiguous on the point in question and, fairly interpreted, indicates a different policy from that which appeared in the original act, this is itself the best evidence that the policy of the law-making power has undergone a modification in reference to the subject-matter, and there is no room for the application of the test herein sought to be applied.

The subsequent statute, if clear, indicates the policy of the law-makers at the time of its enactment.

To apply this principle to the present case, and admitting fully all that is claimed as to the policy apparent in the Bank-

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rupt Law of 1867, it is very evident that that policy had in important respects become modified, and that, too, in the interest of debtors, at the time of the passage of the Act of June 20, 1874.

Under the original act, a bankrupt's property was sequestered for the benefit of his creditors, to be administered by an assignee or trustees to be chosen by them or appointed by the court. The debtor had no voice nor part in that administration.

Under the Act of 1874, this strictness of dealing with the debtor was so far mitigated that by a certain majority vote of the creditors, and with the approval of the court, the debtor might be permitted by these composition proceedings to retain on certain conditions, to be agreed on between him and the majority of his creditors, the substantial control of his property and business, and thus work out a stipulated percentage of his debts, to be paid in satisfaction of the whole. It is unnecessary to refer to other particulars which show the same change of purpose as to the treatment of the debtor who was bankrupt.

This is enough to show that the rigorous policy towards debtors, evident in the Act of 1867, is entitled to little weight in the construction of the Act of 1874, and cannot for a moment avail to wrest from their obvious effect and meaning the language of the later act.

While the discharge of fiduciary debts is certainly a very wide departure from the policy of the original Bankrupt Law, it may have been supposed by the framers of the Act of 1874 that the large majority in value of creditors required at one stage of the proceedings, three-quarters, and the necessity of satisfying the court that the composition is "for the best interest of all concerned," were substantial barriers against the abuse of the statute.

It is certain that the interests of fiduciary creditors are among "the interests of all concerned" which the court is bound to guard, and if it appears that their interests, which of course includes their right to retain their claims for the unpaid balance of their debts, if the estate is regularly wound up in

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bankruptcy, will be unduly sacrificed to the interests of other classes of creditors, or of the debtor by the confirmation of the composition, it might be a valid ground for withholding the approval of the court.

For these reasons, and on the grounds so fully stated by Judge Nixon in the case of *In re Shafer, ut supra*, but with hesitation in view of the very high authority to the contrary, I am of opinion that fiduciary debts are discharged by composition proceedings.

Motion denied.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

SEPTEMBER 3, 1878.

The Bankrupt Court has no jurisdiction, under its summary power to enforce compositions, to take cognizance of and determine questions of title between the debtor and persons not parties to the proceedings; so, where composition proceedings were instituted without an adjudication and the resolution by its terms provided that upon payment of the composition all the debtor's property which he had before the commencement of the proceedings assigned for the benefit of his creditors should be restored to him, no suit having been brought to set aside such assignment, *Held*, That the court had no jurisdiction to compel the voluntary assignee to deliver the property to the debtor.

In re **EZEKIEL WAITZFELDER, MICHAEL WAITZFELDER, and LEOPOLD WAITZFELDER.**

M. H. Regensburger, for debtor.

W. T. Putney, contra.

CHOATE, J.—This is an application to the court under the 17th section of the Act of June 20, 1874, for the enforcement of the terms of a composition.

The statute provides: "The provisions of any composition may be enforced by the court, on motion made in a summary manner by any person interested and on reasonable notice, and any disobedience of the order of the court made on such motion shall be deemed a contempt of court."

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In this case the terms of the composition provided that upon payment of the composition notes the property, heretofore belonging to the alleged bankrupt, which was in the possession of an assignee holding under a voluntary assignment for the benefit of creditors executed before the filing of the petition in bankruptcy, should be restored to the debtor. Upon affidavit that all the creditors have received payment of the composition and that there are no other creditors entitled to any benefit under the voluntary assignment, and that the debtor has demanded the property, and that it has been refused, notice has been served on the voluntary assignee, citing him to appear and show cause why he should not be ordered to deliver the property to the debtor.

The voluntary assignee has appeared by attorney, and makes no question of the fact alleged in the petition as to the full payment of all the creditors entitled to the composition, states that he knows of no other creditor entitled under the voluntary assignment, but suggests that the court has no jurisdiction to make the order. No adjudication has been made, and no suit has been brought to set aside the voluntary assignment.

There is no decision directly in point that the court has power, under this grant of jurisdiction to enforce the terms of the composition in a summary way, to adjudicate upon the rights or obligations of parties other than the debtor or the creditors, or by its summary order direct affirmative action on the part of such third party in furtherance of the objects of the composition. It is clear that the debtor and the creditors, as parties before the court in the proceedings, and as the two parties to the agreement to be enforced, are, both for the purpose of directing their positive action and for the purpose of restraining their actions in violation of the agreement, within the jurisdiction and directing and restraining power of the court. But as to third parties the objection is that they are not parties to the proceeding, nor parties to the agreement. How, then, can they be directed by the court in a summary manner to make a certain disposition of property in their possession, in which their

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claim or title or interest is adverse in any respect to that of the debtor or of the creditors?

Notwithstanding the use of terms in the statute which seemed to imply the power of the Bankrupt Court to determine in a summary manner claims of third parties adverse to the claims of the assignee in bankruptcy, a strict construction in this respect has been put upon the act by the Supreme Court in favor of and for the protection of the rights of third parties as against the summary jurisdiction of the Bankrupt Court, and the powers at first assumed and exercised in this respect have been very much narrowed and restricted, and controversies between the assignee and hostile claimants remitted to other jurisdictions provided for in the act, where their adverse rights might be determined with all the proper safeguards which are ordinarily deemed essential for the proper trial of such questions.

Although the act makes no special provision for the determination otherwise of questions of right and title that may arise between third parties and the debtor or the creditors as the same are affected by composition proceedings, I think the same principle of construction applies to such a case, and that there is not enough in the provision cited above to show that such controversies were intended to be remanded into this court to be summarily disposed of under the power of enforcing a composition.

Thus a State assignee not being a party to the proceeding, holds under a conveyance which creates a trust, imposing on him rights and obligations which indeed the debtor and the creditors may by the force and effect of their agreement of composition modify, but which they cannot by their agreement or by their separate or joint action otherwise affect.

A State assignee may or may not cease by force of the composition to have any duty or trust to perform as to the creditors who were originally the beneficiaries under the trust. Thus if a creditor is omitted from the debtor's statement he would not cease to have an interest under the trust of the assignment, even though by the composition all the other credit-

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ors may have in effect assigned all their right to the debtor on payment of the composition. There would be no power in the Bankrupt Court in such a case, whatever were the terms of the composition, to deprive this outside creditor of his equitable interest in the property held by the assignee in trust for his benefit, which trust has, in the case supposed, not been annulled nor affected by the proceedings in bankruptcy. The Bankrupt Court has no summary jurisdiction to annul and set aside a voluntary assignment. Such action must be effected, if at all, by a suit in equity brought for that purpose.

Where then is the grant of summary jurisdiction to determine as between the voluntary assignee and the debtor, or the creditors, whether the trust of the assignee is or is not fully performed towards all the creditors?

Such a question is not properly a question of enforcing the terms of an agreement between the debtor and creditor.

These observations will serve to illustrate the difficulties that surround the attempt to coerce third parties in their actions under color of enforcing a composition.

This term of the composition, that the property shall be restored to the debtor by the State assignee, may be a reasonable term of the agreement as between the debtor and creditors, and may be enforced so far as they are concerned, and so far as it is competent for them to make any agreement on the subject, on the basis of dealing with interests and rights of property which they are able to deal with by agreement, it seems to be equivalent to an assignment or transfer by the creditors of all their equitable interests under the trusts of the assignment. If now, in violation of that agreement, any creditor should undertake to enforce for his own benefit the trust of the assignment by proceeding to call the assignee to an account in a State Court, it would be competent for this court to restrain him by summary order under its power to enforce the composition.

But, as between the debtor and such assignee, if the rights which have accrued to the debtors are obstructed or denied by such assignee, there are courts to which he can resort to enforce

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his rights in a due and orderly way, and if any right acquired under authority of the laws of Congress, he has his remedy in the ultimate resort to the Supreme Court of the United States.

It is not intended herein to question the power of this court in proper cases to restrain by injunction third parties from interfering with the property of the debtor, or from other acts that may be restrained under the Bankrupt Law, but what is held is that this court has no jurisdiction, under its summary power to enforce compositions, to take cognizance of and determine questions of title between the debtor and parties not parties to the proceeding. The reference in this provision of the statute to the power to punish, as for a contempt, disobedience of its orders made under this provision tends to the same conclusion. It is referred to as applying to all such cases, and it cannot properly apply to any parties except the debtor and the creditors, who alone are the parties before the court.

In this case the State assignee appeared voluntarily on notice, and seems to be not unwilling that the order should be made, but as the court is without jurisdiction, the motion must be denied.

It is hardly necessary to add that the intimations in the cases cited apparently sustaining the power of the court are mere *dicta*, and this question was not before the court, or under consideration of the learned judges. (*In re Hinsdale*, 16 N. B. R., 550; *Poole v. McDonald*, 15 id., 560.)

Motion denied.

NEW YORK COMMON PLEAS.

MAY, 1878.

A composition in bankruptcy does not become effective so as to discharge the debtor from his debts until the composition notes are paid, and if a note given to a creditor agreeing to the composition is not paid when due he can sue for the original debt and is entitled to his *pro rata* pro-

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portion under an assignment for the benefit of creditors, if one has been made.

The debtor made a voluntary general assignment for the benefit of creditors. Proceedings in bankruptcy having been commenced against him within three months thereafter, he made a proposal for composition, which was accepted, the resolution providing that upon *payment* of the composition the debtor's property in the hands of the voluntary assignee should be forthwith delivered to the debtor and the said assignee released and discharged from all claims against him on the part of the creditors arising out of his office. No adjudication was had against the debtor. On an application made before the composition notes were payable to remove the voluntary assignee on the ground that he had failed to file a bond and that without filing such bond he had been selling and disposing of the estate, *Held*, that the assignment was in no way affected by such agreement of the creditors; that the assignee was not thereby relieved of his duty to file a bond and that if he should do so and then transfer the property to the debtor he would do it upon his own responsibility if the composition is not carried out.

In re assignment of MORITZ LEIPZIGER.

APPLICATION for the removal of Frederick Lewis as assignee of Moritz Leipziger, under a general assignment for the benefit of creditors, on the ground that he has not filed a bond as required by statute, and that, without filing the said bond, he has been engaging in selling, disposing of and converting the estate, and for the appointment of a new assignee.

The assignment to Lewis was made on the 9th day of January, 1878, and was duly acknowledged and recorded according to law, and the assignee took possession of the estate on the same day. Schedules were filed by the debtor, January 26, 1878, and upon the schedules so filed the assignee's bond was fixed at the sum of twenty thousand dollars, but no bond has ever been given.

Proceedings in bankruptcy were commenced against Moritz Leipziger within three months thereafter, but no adjudication was had therein. Pending these proceedings, said Leipziger made a proposal for composition, which provided for the payment of twenty per cent. in one payment, in ninety days from the entry of the order recording the resolution to accept the composition, secured by his note endorsed by one Louis Ettinger. This proposal was duly accepted, the resolution providing that "upon the payment of the said sum of twenty per cent. as herein provided, all the property and effects of every kind and

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nature of the said Moritz Leipziger, the alleged bankrupt, and all the books and papers relating thereto which have come actually or constructively into the possession of Fred. Lewis, assignee for the benefit of creditors, and all right, title, claim and demand whatsoever which the said Fred. Lewis, assignee as aforesaid, may have therein or thereto shall revert to the said Moritz Leipziger, the alleged bankrupt, and the said property, assets, books, papers and effects shall forthwith be delivered to said Moritz Leipziger, such alleged bankrupt, and the said Fred. Lewis, assignee for the benefit of creditors, shall thereupon be forever released and discharged from any claims against him on the part of said creditors arising out of such office and his duties in connection with the estate of the said Moritz Leipziger, the alleged bankrupt."

Upon this application an order was granted on the 21st day of March, 1878, requiring the said Frederick Lewis to show cause why he should not be removed from acting as such assignee, and a temporary injunction was also granted restraining him from interfering with the estate.

Upon the return of the order to show cause it was contended by the assignee that in view of the provision of the resolution of composition above cited, it was not necessary to file a bond.

Chamberlain, Carter & Eaton, for the petitioner.

C. N. Runkle, for the assignee.

DALY, C. J.—My conclusion on this application is that the composition is a proceeding distinct and different from the proceedings for a discharge in bankruptcy, and that the construction which has been given by the United States Courts to the law respecting the one does not necessarily apply to the other; that the composition does not become effective so as to discharge the petitioner from his debts until the composition notes are paid, and if a note given to the creditor agreeing to the composition is not paid when due, he can sue for the original debt and is entitled to his *pro rata* proportion under an assignment for the benefit of creditors, if one has been made. (*Ed-*

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wards v. Hancher, L. R., 1 C. P. D., 111; *Edwards v. Coombe*, L. R., 7 C. P., 519; *Newell v. Van Praagh*, L. R., 9 C. P., 96.)

What was held in *Miller v. Mackensie*, (13 N. B. R., 496, 2 W. Dig., 205), upon which the assignor relies is, that where the creditors agreeing to the composition were all paid, and the creditor had been tendered the sum paid to each of the creditors agreeing to the composition, and he had refused to take it, his debt was extinguished and that a writ of attachment sued out by him to enforce his debt should be quashed, which is not the present case. Nothing has been done in this case but to give notes for the composition, which may never be paid. The composition provided for by the Act is a *pro rata* payment or satisfaction in money. (Section 5103.) The creditors in this case agreed to take notes payable in three months with a certain person as endorser, but until these notes are paid there has not been a *pro rata* payment or satisfaction in money. It has been simply an agreement on the part of the creditors to give the debtor time to effect the composition, and it is not effected until the notes are paid. The creditors taking these composition notes also agreed that the assignee under the State law might surrender and deliver up to the debtor all property received by him under the assignment, and waived notice of any proceedings he might take to be discharged from his liability as assignee. It does not follow from this that we are called upon to relieve the assignee from giving the bond required to perfect his title to the property. If he does not file a bond within the specified time, the court has power to remove him, to make provision for the safe custody of the estate, and the appointment of another assignee. (Laws of 1877, Chap. 466, Sec. 6.)

If he files it, and then transfers the property assigned to him to the debtor, he does it upon his own responsibility if the composition is not carried out and effected. So far as this court is concerned, he must file his bond or be removed. After he has done so, he must act upon his own responsibility and that of his sureties if he considers himself justified in delivering up the assigned property to the debtors.

In re Dobbins.

Whether the extinguishment of the debts by the payment of the composition notes will have any effect upon an assignment made within three months of the filing of his petition by the debtor for the discharge of his debts, upon an agreement of the requisite number of his creditors to accept a composition, is a question I am not now called upon to decide. What I do decide is that the assignment is in no way affected by what has in fact taken place—an agreement of the requisite number of creditors to receive endorsed notes for the *pro rata* amount agreed upon, and their agreement that the assignee may deliver up the assigned property to the assignor.

UNITED STATES DISTRICT COURT—N. D. OHIO.

AUGUST 17, 1878.

At the meeting of creditors called to take action on a resolution of composition, the register has no authority to require any other person to testify except the debtor.

In re HUGH DOBBINS.

OPINION OF REGISTER.

THE debtor, Hugh Dobbins, having filed a petition for a composition with his creditors, which was duly referred to James Irvine, register, for proceedings authorized by the law on behalf of his creditors at a meeting of such creditors to be called by the register.

At such meeting of the creditors, the debtor, Dobbins, was present and was examined in presence of the creditors assembled. From that examination it appeared that Dobbins had, before petition filed, in October, 1877, made a general assignment for benefit of creditors, under the laws of the State of Ohio, to one Moses McGinnis, who had sold most of the property, and who had filed an account with Probate Judge setting

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out his proceedings in the trust, showing the money collected and disbursed under the assignment. Thereupon Farwell & Co., creditors who had proved their debt, and being then present, filed a motion with the register, requesting him to issue a summons for said McGinnis, requiring him to appear before the register forthwith, with his books and papers, to give testimony before the creditors in relation to the said trust proceedings; and also asked that one Hoover, who it was alleged had bought up claims against said debtor, and procured payment therefor from the said assignee out of the funds in his hands, might be summoned and examined.

The register refused to issue such summons, which refusal was excepted to by said Farwell & Co., and register asked to certify the question to the District Court, which he did accordingly, with the following opinion:

Section 5103A, under which composition proceedings are authorized, lays down the successive steps to be taken by the parties interested.

It permits the examination of the debtor, but gives no authority to compel the attendance or testimony of others.

The proper way it seems to me is to file objections to the confirmation of the resolution by the court (if it shall be adopted and confirmed by the required number of creditors), and then the court can order such examination as shall seem to be proper. But it is my opinion that, at the meeting of creditors called to take action on the resolution, I have no authority to require any other person to testify except the debtor, and I therefore refused the request.

JAS. IRVINE, *Register*.

LIMA, O., *August* 14, 1878.

WELKER, J.—I have carefully examined and considered the question made by the register, and confirm and approve his ruling therein.

In re Lachemeyer.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

SEPTEMBER 20, 1878.

A claim for alimony, whether the same accrued before or subsequent to the commencement of the proceedings in bankruptcy, is not a provable debt, and proceedings to enforce its payment cannot properly be stayed by the Bankrupt Court.

*In re FREDERICK LACHEMEYER.**A. W. Gazzam*, for bankrupt.*W. H. Secor*, for wife.

CHOATE, J.—This is a motion to vacate a stay of proceedings on the part of the bankrupt's divorced wife for the enforcement of a decree for alimony.

Upon decree of divorce on the ground of adultery pronounced several years before the commencement of proceedings in bankruptcy, alimony was decreed to the wife at the rate of fifty dollars a week during her natural life. The decree contained a provision allowing either party to apply to the court for a modification of the decree upon the happening of any event materially changing the circumstances of the parties. There is a large amount of arrears of alimony which became payable before the bankruptcy, still unpaid, as well as a further amount which has since accrued.

As to the continuing obligation to pay alimony since the commencement of the bankruptcy proceedings, there can be, I think, no question that it is not affected by the bankruptcy. The obligation cannot be discharged by the discharge in bankruptcy.

Independently of the peculiar character of the obligation which raises the question whether any claim for alimony accrued or otherwise is in its nature provable under the Bankrupt Law, the obligation to future payments is not, within Section 5067, a debt then existing but not payable till a future day, in which case it might (if a debt at all) be proved with a

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rebate of interest, because the obligation to pay it in the future is contingent upon the life of the wife. The debts so described in that section are debts to become due absolutely at a future time. Nor is it a contingent debt or liability within the meaning of Section 5068; *first*, because it does not arise upon a contract of the bankrupt, and the provisions of that section have been held on what seems to be a reasonable construction of its terms to be confined to debts arising upon contract. (*Zimmer v. Schleehauf*, 11 N. B. R., 313.) And *secondly*, it is not within that section, because that section relates only to those contingent obligations of which the present value can be estimated. (*Riggin v. Maguire*, 8 N. B. R., 484; 15 Wall., 549.) And the amount of the alimony yet to accrue at the date of the bankruptcy was subject to modification by the action of the court by which it was decreed, and therefore any present valuation of it was impossible. The future alimony, therefore, not being a provable debt, proceedings to enforce its payment cannot properly be stayed by this court even though the question of the bankrupt's discharge is still pending and undetermined. (Section 5106.)

As to the arrears of alimony due at the commencement of the proceedings in bankruptcy, a question arises whether they are not to be regarded as a debt upon judgment of a nature provable in bankruptcy. There seems to have been no decision upon this point either under the present law or that of 1841. Under the English Bankrupt Law such a claim is provable under an express provision that the order of discharge should discharge the bankrupt "from the effect of any process issuing out of any court for contempt of any court for non-payment of money, and from all costs that he would be liable to pay in consequence of or on purging his contempt," and "that a person entitled to enforce against the bankrupt payment of any money, costs, or expenses by process of contempt issuing out of any court shall be entitled to come in as a creditor under the bankruptcy, and prove for the amount payable under the process." (*Dickens v. Dickens*, 2 Swa. and Tris., 645.) As this decision is based wholly on these provisions in the English

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Law, it affords no aid in the construction of our Bankrupt Law except the very general consideration that such a claim has been deemed a proper one to bring within the operation of a system of bankruptcy. It was held under the Bankrupt Law of 1841 by the District Judge of Connecticut that a judgment under a Connecticut statute for the maintenance of a bastard child was not a "debt" provable and dischargeable within the meaning of that law. (*In the matter of Cotton*, 2 N. Y. Leg. Obs., 370.) The decision is based on the peculiar nature of the obligation on which the judgment was founded, being a natural duty growing out of the relation of the parties and not out of any contract.

That case certainly affords a strong analogy to the present. Similar rulings have been made in some of the State Courts as to judgments for maintenance of bastard children under the former and present Bankrupt Laws. (*Harves v. Cooksey*, 13 Ohio [Stanton], 242; *Commonwealth v. Erisman*, 21 Pitts. L. J., 69.) It has been held that a penalty due to the United States for violation of the Revenue Laws for which an action will lie is a provable debt. (*In re Rosey*, 8 N. B. R., 509; 6 Ben., 507.) And so as to a claim for the value of goods forfeited. (*In re Vetterlein*, 13 Blatch., 44.) And in the case last cited it is said by Mr. Justice Hunt that "whether the debt arises from a promise to pay, or whether it arises from a duty or obligation to pay is not important." On the other hand it has been held that a judgment for a fine is not provable. (*In re Sutherland*, 3 N. B. R., 314; 1 Deady, 416). In the case of *In re Henricksburgh* (7 N. B. R., 37; 6 Ben., 150), it seems to have been held that a judgment for a mere personal tort is a provable debt. And in the case of *In re Schuchardt* (15 N. B. R., 161), there is a dictum of Judge Blatchford to the same effect as to a judgment for damages for deceit. A judgment for costs has been held to be provable. (*Graham v. Pierson*, 6 Hill., 247).

The weight of authority at present, therefore, clearly is that a positive obligation to pay a certain sum of money, liquidated, and for which an action will lie, though not based upon contract nor growing out of contract, is a provable debt

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under the present Bankrupt Law, and these later authorities have given a more extended construction to the word "debts" under the present Bankrupt Law than was given to the same word in the Law of 1841 by the District Court of Connecticut in *Re Cotton, ut supra*, where a judgment for damages for seduction was held not provable.

But a claim for arrears of alimony is in some respects different from any of the obligations held provable in the cases above cited. It is not generally enforceable by action but by process for contempt. If the obligation to pay the overdue alimony were an absolute obligation enforceable in a personal action it would seem to be within the cases cited above, although this obligation to pay has resulted from a natural duty which the party has repudiated or has refused or neglected to perform.

It cannot well be said as to overdue alimony, as it may be as to future alimony, that it is a mere liquidation of or fixed compensation for the breach of an existing natural obligation which is the principal obligation, for as to the time past there is no such obligation, and all that remains is the obligation to pay the money according to the decree of the court. It seems, however, that one of the reasons why an action will not ordinarily lie to enforce a decree for alimony is that from the peculiar character of the obligation, the decree is always subject to modification by the court in which the decree was entered according to the varying circumstances of the parties, and that no other court can undertake to administer the relief to which the parties are entitled except the court which has jurisdiction of the original suit. (See remarks of Hornblower, C. J.; 3 Harrison, [N. Jers. L. R.] 188, 193; also *Allen v. Allen*, 100 Mass., 373.)

The case as to overdue alimony is not free from doubt, but, upon the whole, I am of opinion that it is not a provable debt within the meaning of the Bankrupt Law, because not an absolute obligation enforceable by action.

Some considerations touching the general policy of the Bankrupt Law point, I think, to the same conclusion.

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The two chief objects or general purposes of a Bankrupt Law are the relief of unfortunate persons, who by losses in business have become insolvent and unable to pay their debts in full, and the equitable distribution among creditors of whatever property such persons may still have. It is chiefly for the relief of business men as business men, and indirectly for the public good, and rehabilitating them to a condition in which as active business men they may take their proper share in the productive and industrial class of the community.

The obligation to pay alimony, though in form a *quasi* debt, partakes in no degree of that business character of the obligation chiefly within the purview of a bankrupt system. It is one of the sanctions devised by the law for the enforcement of a natural duty or obligation and the punishment of its violation.

It may well be said to be in its nature foreign to the scope of a bankrupt system, so far as that system deals with the debtor and his release. And in this respect it is wholly unlike some of those absolute obligations not growing out of contract which have been held to be within the purview of the Bankrupt Law, as, for instance, forfeitures and penalties due to the United States, which, though not based on contract, do grow immediately out of and are incurred in the course of business transactions.

Again, as to the relief of this *quasi* debtor, he is not without remedy, as he may always apply to the justice or mercy of the court having jurisdiction of his cause.

Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled than as strictly a debt, and alimony payable from time to time may well be regarded as a portion of his current income or earnings, and is ordinarily based and measured in its allowance upon such income or earnings. The court having jurisdiction of this peculiar subject is alone competent to deal with the equities which changes in the circumstances of the husband's property or income may introduce into questions of alimony. It may also well have been thought that the public good re-

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quires that the sanctions thrown about the marriage relation and its duties should not be weakened by a release of the husband from obligations of this character by any other than a divorce court, and especially by a release depending upon considerations having no relation whatever to those considerations which fixed and defined the terms of the obligation itself. It is also obvious that claims of this character are not of so common occurrence that their exception out of the Bankrupt Law would have any appreciable effect in diminishing the general good to the community which the release of insolvent debtors was intended to accomplish.

These and other considerations which might be suggested go to show that there may have been good reasons for omitting this class of obligations, so far as debtors are concerned, from the scope of a bankrupt system, although, as it has been seen above, they have not been deemed sufficient in England to have that effect there.

While, on the other hand, as regards the interests of the creditor class, which are intended to be provided for by the bankrupt system, it may be said indeed that there is some hardship in excluding a divorced wife from sharing with the creditors in the existing assets of her bankrupt husband to the extent of her overdue alimony, yet probably on the whole it is an advantage to this class of persons to be excluded from the law altogether rather than to be included subject to the release of the unpaid balance, as they are in England, because the great majority of bankruptcies in this country at least are bankruptcies with little or no assets, and it may in general be said that the very fact of the alimony being largely in arrear indicates either laches in the wife in not seeking to enforce what from its very nature was intended to be a punctually paid obligation, being intended for her support from week to week or month to month, or that the income and earnings of the husband are so reduced that in fact he cannot be compelled, even by the plenary powers of the divorce court, to make that provision for his wife which was held to be just and reasonable at the time the allowance was fixed. And in the latter case

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there is no very strong ground of reason or justice for giving the wife extraordinary favor in the distribution of her husband's estate, for the wife agrees at the marriage to share his varying fortunes, and the mere fact that she has been divorced from him affords no reason why she should not also share in the hardships incident to his misfortunes in business.

It may well be, therefore, that upon considerations of public policy touching the interests both of debtors and creditors and husbands and wives, this class of claims was intentionally omitted from the provisions of the act, and left where it was found, exclusively for all purposes within the jurisdiction of other tribunals.

At any rate these reasons bearing on a question of doubtful construction seem to me sufficient to exclude this claim from the class of debts provable in bankruptcy. It will be observed that Sec. 5072 of the Revised Statutes necessarily implies that there are claims which may in some sense be described as *debts* which are not provable. One well-defined class of such obligations is the whole class of unliquidated damages for mere torts. But there may well be other claims thus excepted, and I think the present is one of them.

Injunction dissolved.

SUPREME COURT—ILLINOIS.

SEPTEMBER 30, 1878.

An assignee cannot reclaim money deposited for a special purpose, in which the person holding the deposit has acquired a vested interest.

The bankrupt procured a loan of fifteen thousand dollars through appellant's firm, who were insurance agents, and left six hundred and forty dollars and forty cents thereof in their hands to be applied as premiums upon policies to the amount of thirty thousand dollars, which he agreed to furnish in the company represented by them as a mode of compensation for their services. He procured a policy for fifteen thousand dollars on his own life and one-half of the amount in the hands of appellant's firm was applied in payment of the premium on this policy. No other risks were furnished. In an action by the assignee in bankruptcy against appellant as

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survivor of his firm to recover the balance of the amount so left, *Held*, that the firm had a vested interest in the money and the assignee was not entitled to recover.

ABIAL R. NEWCOMB v. WILLIAM P. LAUNTZ,
Assignee, &c., of HENRY RECKER.

Appellant's firm, as insurance agents, effected a loan for one Recker, who became bankrupt afterwards. A certain sum was left by Recker in appellant's hands to effect insurance risks and pay premiums. Recker's assignee in bankruptcy sued for this money and recovered judgment.

Garland Pollard, for plaintiff in error.

M. Millard, for defendant in error.

SCHOEFIELD, J.—Appellee, as assignee in bankruptcy of Henry Recker, obtained judgment in the court below for three hundred and twenty dollars and twenty cents, being amount of money claimed to have been placed in the hands of appellant, as agent of Recker, by Recker, and by appellant retained and refused to be returned after demand made to that effect.

Recker, through a firm of which appellant was a member, and of which he is now sole surviving partner, obtained a loan of fifteen thousand dollars, and of this left in the hands of appellant's firm, six hundred and forty dollars and forty cents to be applied as premiums on life insurance, which he agreed to furnish in the American Life Insurance Company to the amount of thirty thousand dollars. He took out a policy on his own life for fifteen thousand dollars, and three hundred and twenty dollars and twenty cents of the amount in the hands of appellant's firm was applied in payment of the premium on this policy. He furnished no other risks, and appellant's firm still retaining the remaining three hundred and twenty dollars and twenty cents, refused to pay it over to him on demand. This money is in the hands of appellant as surviving partner.

Appellant's claim is, that Recker's agreement on leaving this money with his firm was in fulfilment of his prior con-

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tract with them in regard to obtaining the fifteen thousand dollar loan, that it should be left in their hands and applied as premiums on risks as a mode of compensating them for their services in aiding him to effect the loan, they being insurance agents for said company and pecuniarily interested in obtaining risks. If this be true, they had a vested interest in the money which Recker could not by any act of his divest without their consent.

There was evidence tending to establish this claim, and there can be no question that if it preponderated Recker's assignee could not recover the money in an action of assumpsit on the common courts.

The second instruction given at the instance of appellee was, "unless it was expressly agreed that the three hundred and twenty dollars and twenty cents should be forfeited in case of Recker's failure to perform his part of the contract, the defendant has no right to retain it." This instruction was calculated to mislead the jury, and the giving of it was error.

No claim was made that Recker had forfeited the money. The question was simply whether appellant, or the firm he represents, had a vested interest in the money. If they did not have, Recker might, at any time before his directions in regard to it were acted upon, demand its return to himself, and, upon refusal, recover under the counts for money had and received to his use. If they had a vested interest in the money Recker could not solely of his own volition, and without their consent, abrogate the contract. Whatever rights might exist in his behalf could only be enforced under the contract.

The other errors we do not think well assigned.

The judgment is reversed and the cause remanded.

Citizens' National Bank v. Cass et al.

UNITED STATES CIRCUIT COURT—W. D. PENNSYLVANIA.

SEPTEMBER 23, 1878.

Where, in a voluntary petition of partners in trade, the names of any of the copartners are withheld, creditors cannot supply the omission, because in voluntary proceedings the law provides for a proceeding *in invitum* against non-joining parties only at the instance of their petitioning associates.

Such omission will not affect the rights of creditors against partners who are not parties to the proceeding. The law leaves them in possession of all remedies against parties not joined which they had before.

If any are excluded who ought to be joined, the court will refuse to the petitioning parties the benefit of the act, and leave them, as well as their associates who refused to join, subject to all the remedies to which their creditors might resort, irrespective of the bankruptcy proceedings.

*CITIZENS' NATIONAL BANK v. GEORGE W.
CASS and THE CAMBRIA IRON CO.*

Bill of review. The facts appear fully in the opinion.

McKENNAN, J.—Strongly impressed as I am with the equity of the petitioners' contention, I have endeavored to reach a conclusion which might give effect to what seems to me to be the ultimate merits of the case, resulting from the true relations of the parties to each other. But the desired result can only be accomplished by an exercise of the appropriate jurisdiction of the court, within the limits and in accordance with the spirit and object of the law which confers it.

A voluntary petition was presented to the District Court, for a discharge from their debts, by three persons, claiming to constitute a partnership, and as such to have contracted debts and acquired property. A schedule of these assets and debts, as well as of the individuals represented to compose the firm, was filed, an adjudication was made in due course, and an assignee duly appointed, to whom all the property of the petitioning debtors, partnership and separate, was conveyed.

Nearly two years after this, the complainant in this bill, a creditor of the bankrupt firm, presented its petition to the District Court, alleging that the firm consisted of the three petitioning debtors and the two respondents, and asking the

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court so to adjudge and to order the joinder, in the bankruptcy proceeding, of the respondents with the other acknowledged members of the partnership. This the District Court refused to do, and the question is whether this decision was right. I am of opinion that it was—and for the following reasons, which I am only able to state with great brevity.

The unquestionable effect of the assignment was to vest in the assignee all the joint property of the petitioning partners and to make it available for the payment of the firm creditors, so that the plain object of the proceeding is to subject the individual property of the respondents to the payment of the partnership liabilities. But two methods are provided by the bankrupt law by which this can be done.

1. Upon the petition of one or more partners in trade, in which one or more of the alleged partners refuse to join.

2. Upon the petition of the required number of the firm creditors representing the required proportion of the partnership indebtedness.

In the first of these methods it is essential that the names of all the members of the firm should be stated in the petition, because notice is required to be served upon those who refuse to join, to the end that they may, on the return day of the writ to show cause, make any available defence against the application. This is the clear import of Sec. 5121 of the Revised Statutes, and of General Order 18, which provides the mode of proceeding under it.

The primary object of the first mode of proceeding is to secure to the petitioning bankrupts a discharge from their debts—which might be procured against their estate—to this end the law requires a surrender of all the property of the bankrupts, and an honest disclosure of every material fact within their knowledge, touching the nature of their indebtedness, as necessary conditions of their discharge. If they withhold in their petition the names of any of their copartners, they may thereby defeat their application for a discharge; but it is not incumbent upon any of their creditors to supply the omission, nor can they do so, because, in voluntary bankruptcy,

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the law provides for a proceeding, *in invitum*, against non joining parties only upon the promotion of their petitioning associates. Nor will such omission affect the rights of creditors against partners who are not parties to the proceeding. The law leaves them in the possession of all the remedies against parties not joined which they had before, while it may, as the penalty of bad faith, deny the fundamental object of the application. And furthermore, the Bankruptcy Court will, in the exercise of its just discretion, so control this course of the proceeding as to protect firm creditors from any embarrassment in the pursuit of their lawful remedies against recalcitrant partners.

In its initial features, the second mode of proceeding differs from the first. Its object is to supersede the control of a debtor, who has committed an act of bankruptcy, over his property, and to secure its appropriation to the payment of his debts. Hence it is adversary as to him, and can only be instituted by creditors, a certain proportion of whom representing a certain proportion of the debtor's liabilities must unite in the application.

In both modes of procedure then essential conditions must exist. In a voluntary application the initiative must be taken by the debtor, and in the case of a partnership, by one or more of its members, at whose instance alone can other members, who refuse to join, be brought in.

If any are excluded who ought to be joined, the court will refuse to the petitioning parties the benefit of the act, and leave them, as well as their associates who refused to join them, subject to all the remedies to which their creditors might resort, irrespective of the bankruptcy proceedings. But the court cannot aid a creditor in accomplishing, by intention, a result which could only be reached directly by the observance of indispensable conditions.

The bill of review must therefore be dismissed.

In re Bjornstad.

UNITED STATES DISTRICT COURT.—W. D. WISCONSIN.

A merchant is entitled to two hundred dollars exemption of stock in trade in Wisconsin, under subdivision 9, Section 31, Chap. 134, R. S. of Wisconsin.

In the absence of any fraudulent intent, partners may dissolve partnership, one partner sell his interest to the other, and the partner continuing in interest be allowed to claim his exemption from the stock, even though the partnership was owing debts in excess of their assets at the time of dissolution.

In re J. BJORNSTAD.

THE facts appear fully in the opinion.

H. M. & H. A. Lewis, for assignee.

J. H. Carpenter, and *R. B. Smith*, for bankrupt.

BUNN, J.—I. The facts as stipulated by the parties are these: that in October, 1875, the bankrupt and one Martin Madson formed a copartnership for general merchandising, which they carried on until about February 27, 1878, under the firm name of Bjornstad & Co., during which time they contracted debts, which are still unpaid, to the amount of five thousand dollars. That about February 27, 1878, they dissolved the partnership, by Madson selling out his interest in the concern to Bjornstad, who took the stock, which amounted to about two thousand six hundred and fifty dollars, assumed the partnership debts, and thereafter until about . . . 1878, when the petition in bankruptcy was filed, carried on the business in his individual behalf.

The question submitted is whether the bankrupt is entitled to two hundred dollars exemption of the stock in trade, under subd. 9, Section 31, Chap. 134, R. S. of Wisconsin.

That subdivision is as follows: "The tools and implements or stock in trade, of any mechanic, miner, or other person, used or kept for the purpose of carrying on his trade or business, not exceeding two hundred dollars in value."

It is insisted by the attorneys for the assignee, that this

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provision does not extend to merchants, but only to mechanics and miners, and to other persons to whom tools and implements are necessary to carry on their business, on the principle of "noscitur a sociis," and the argument seems very plausible, to say the least. The question is whether it is conclusive. There is one circumstance which, in my judgment, should have great weight in determining this question of exemption; and that is the uniform construction that has been placed upon the language of this subdivision in the State. Though, strange to say, the question has never been directly decided by the Supreme Court of the State, it has been decided again and again in the several Circuit Courts, and, so far as my information goes, always in favor of the more liberal construction that would extend the exemption to merchants, as well as mechanics and miners. And I think this has been the general practice and understanding of the courts, and of the profession, to allow the exemption. In some of the circuits at least, of my own knowledge, the statute has been so construed by successive circuit judges for upwards of twenty years, and the rule become well settled and undisputed. And I am informed that such is the case in other circuits.

In the absence of any decision to the contrary by the highest court of the State, I think it is not too much to say that the decisions and practice of the Circuit Courts may be taken as the law. And accordingly it has been the uniform practice in this court, and I understand also in the Eastern District, ever since the Bankrupt Law went into effect, to allow the exemption. This uniform and concurrent practice, acquiesced in for so long a time in the State and Federal Courts, might be taken as conclusive of the law. But as the question may arise again, it may be well enough to look at it a little *de novo*.

Our constitutional provision is as follows: "The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted."

It was incumbent on the Legislature to carry out this bene-

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ficent provision of the constitution, and it did so at an early day in an enlightened and liberal manner, according to the spirit and purpose of the provision. As the provision is general, applying to all debtors, it is fair to infer that, to carry it out according to its spirit and purpose, all classes of persons should be recognized and as far as possible equally provided for, and that, in making general provisions for exemptions as the Legislature did, it intended to carry out the constitutional provision in a manner to cause its benefits to be shared in as equal a manner as possible by all classes of debtors. And it would seem, if the statute is fairly capable of such a construction, it should be so construed. I am inclined to think it is. The exemption laws are remedial and beneficent acts of legislation, and are to be liberally interpreted and administered to carry out the constitutional provision. (*Gilman v. Williams*, 7 Wis., 329.)

Section 23, Chap. 134, exempting a homestead, applies to all classes of debtors. Subdivisions 1, 2, 3, 4, 5, and 6, exempting the family Bible, family pictures and school-books, family library, pew in church, wearing apparel and household goods, apply equally to all classes of debtors. Subdivision 7, exempting two cows, ten swine, one yoke of oxen and one horse, or in lieu thereof a span of horses, ten sheep and the wool from the same, either in the raw material or manufactured into yarn or cloth; the necessary food for all the stock mentioned in this section for one year's support, either provided or growing, or both, as the debtor may choose; also one wagon, cart or dray, one sleigh, one plow, one drag, and other farming utensils, including tackle for teams, not exceeding fifty dollars in value, though in terms applying to all classes of persons, from the nature of the articles exempted, applies to a much larger extent to farmers than any other class, because they are the only persons that ever keep or have any use for many of the articles named as exempt. Subdivision 8 exempts provisions for the debtor and his family necessary for one year's support, either provided or growing, or both, and fuel necessary for one year, and applies to all classes.

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Then follows Subdivision 9, first above quoted, which provides for mechanics, miners, etc., and also in a subsequent part of the subdivision exempts the library and implements of any professional man not exceeding two hundred dollars; and then follow many other specific provisions scattered through the Session Laws, making provision in the main, though not always, for certain classes of debtors. One exempts all sewing-machines kept for use in the family. Another all printing materials and press or presses used in the business of any printer or publisher to an amount not exceeding one thousand five hundred dollars in value. Another exempts horses, arms, equipments and uniforms of all officers and privates in the organized militia of the State. Another exempts all books, maps, plates and other papers kept or used by any person for the purpose of making abstracts of title to land. Another exempts the interest owned by an inventor in any invention secured to him by letters patent of the United States. Another the earnings of all married persons, and all other persons who have to provide for the entire support of a family, for the sixty days next preceding the issuing of any process of attachment or execution, etc. This provision was undoubtedly intended mainly for the benefit of laborers. There are still other specific provisions which it is not necessary to enumerate.

It will be seen that, besides the general provisions which apply to all classes, there are specific ones applying to all the leading industrial classes of the community, unless it be the merchant. The farmer, the mechanic, the miner, the professional man, the printer, the military man, the laborer, are all snugly and expressly provided for against the stroke of accident and chance of time. Now there would seem to be as much reason for making provision for the merchant as any other class. They are certainly quite as likely to be overtaken by misfortune and to need the exemption. It is insisted that while two hundred dollars of tools and stock in trade would be of some use to enable the mechanic to pursue his trade, that two hundred dollars' stock in trade would not be enough to set a merchant up in business or be of much practical use to

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him. But it is submitted that although it would not go far as stock in trade, even so small an amount protected by the beneficence of the law from the rapacity of creditors in the hour of adversity might do something towards keeping starvation from his family, while he should have a little time in which to look about and either make arrangements to continue in business or turn his hand to some other employment.

In the case of *Bevitt v. Crandall* (19 Wis., 581), a farmer claimed as exempt under this same subdivision a grain-drill worth eighty dollars. But the court very justly held that, although a literal construction would include the farmer, it could never have been intended to apply to him because he was specifically and liberally provided for in Sub. 7, which exempts his team and tackle, sheep, cows, swine, the food for a year's support of the same, wagon, cart, sleigh, plow, drag, and other farming utensils not exceeding fifty dollars in value. But by parity of reasoning the same provision should apply to the merchant, because he is nowhere else provided for. When we look at the language of the section and compare it with all the other provisions, keeping in view the presumed intention of the Constitution and the Legislature to make equitable provision for all classes, it would seem that there is strong reason for holding that it was intended in this subdivision to provide for merchants. I am referred to the case of *Grimes v. Bryne* (2 Minn., 89), as an authority the other way. I am not clear but that case, as well as *Guptil v. McFee* (9 Kan., 30), which follows the Minnesota case, is against the construction which has generally obtained in relation to this provision of our statute, and which I am disposed to follow. But there is one consideration which is very noticeable, and that is the difference in the language of the two statutes. The provision of the Minnesota statute is: "The tools and instruments of any mechanic, miner or other person, used and kept for the purpose of carrying on his trade or business; and in addition thereto stock in trade not exceeding four hundred dollars in value." The words, "and in addition thereto stock in trade," would seem to indicate that it was the intention

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that the exemption of stock in trade should apply only to the same classes of persons provided for in the previous part of the section, and not the merchants to whom tools and instruments are not necessary in their business, and so the court looked upon it, for they say, "In addition to what? why, manifestly in addition to tools and implements above exempted. The Legislature did not intend to leave the tools of the shoemaker or harnessmaker in his hands and deprive him of the means of using them; they gave him a stock of material to work upon, to render the provision of exemption of some utility. The two classes must stand together to bring either in harmony with the spirit of the law. The stock would be worthless without the tools, and the tools idle without the stock."

The language of our statute is different, and I am inclined to think the provision different in substance. The use of the disjunctive *or* in the language, "the tools and implements, *or* stock in trade, of any mechanic, miner or other person," would seem to indicate a purpose of providing for two classes of persons, that is to say, for mechanics and miners and others to the exercise of whose trade or business tools or implements are necessary, and to another class of persons like merchants, to whose business stock in trade is essential, but tools and implements are not. I think at any rate the language will fairly bear this construction. It is certainly broad enough, if interpreted any way literally, to include merchants. And considering the beneficent purpose of the law to make reasonable and equal provision for all classes of the community, I am disposed to think that the maxim "*noscitur a sociis*" should not in this case prevail over all other principles of construction, so as to deny so large and useful a class of the community an equal participation and enjoyment of the benefits of the exemption law.

That it should be applied to the extent of excluding farmers and others who are otherwise specially provided for, as held by Dixon, C. J., in *Bevitt v. Crandall*, *supra*, I have no sort of objection. Still I do not think it requires a resort to that maxim to hold that this provision was never intended to apply to farmers.

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II. But it is claimed the exemption should not be allowed because the debts are partnership debts, and that when contracted the property belonged to the partnership, and there is some show of reason as well as authority for this position. But, in the absence of any fraudulent intent, I see no reason why partners may not dissolve the partnership, sever their interest in the property, or one partner sell out his interest to the other, as was done in this case, and the partner continuing the business and owning the goods be allowed to claim his exemption the same as though no partnership had ever existed. This would seem to be in accordance with the principle laid down by Ryan, C. J., in *Russel v. Lennon* (39 Wis., 570). If, as is said in that case, each member of a partnership is in proper cases entitled to his separate exemption out of the partnership property; and that the partnership property, after levy, may be severed by the partners, so that each partner may have his several exemption, it would seem to follow as a consequence of this doctrine that if the partnership is dissolved and the partnership stock transferred to one of the partners, it is no longer partnership property, and the right of exemption on the part of the owner of the property attaches. But it is claimed that the joint creditors have a lien on the partnership property for the payment of the joint debts, and this is true in a certain qualified sense. It is clear law that, as between the joint creditors of the partnership and the separate creditors of the individual partners, the joint creditors are entitled to priority of payment from the partnership funds, and the individual creditors from the individual funds of the partners. And in this sense they are said to have a lien on the partnership property so one partner cannot sell out his interest to a third person so as to prevent the payment of the joint debts, and such transfer only conveys to the purchaser the interest of the partner in the surplus after payment of the partnership debts. (*Menagh v. Whitwell*, 52 N. Y., 146). But the lien is not a lien in the same sense that a mortgage or execution levied is a lien by any means. It is not a lien that transfers any title to the property or any actual interest in it. The partnership creditors have just as much of a

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lien, and no other or greater, on the partnership property as the creditor of an individual debtor has upon his property. (*Burns & Smucker v. Harris & Allen*, 67 N. C., 140). There is in short nothing in such a lien to prevent one partner selling his interest in the goods to his copartner, and conferring a good title, if done in good faith and with no intent to place the property beyond the reach of creditors.

It is true that at the time of the dissolution the partnership was in debt, and their liabilities by far exceeded their assets. But there is nothing else tending to show fraud, and this of itself is not enough. If there had been any attempt to withdraw the funds and put them in a homestead or otherwise beyond the reach of creditors, the case might come within the principle of *Re Santhoff & Olson* (16 N. B. R., 181; 5 C. L. J., 364). But nothing appears to show that the transaction was not bona fide. And upon the whole, I think the exemption should be allowed.

UNITED STATES DISTRICT COURT—MICHIGAN.

APRIL 29, 1878.

The requirement that the bankrupt shall keep proper books of account is satisfied if his creditors can gather from them a correct understanding of his business and financial condition.

A discharge will not be refused upon the ground of material erasures and alterations in such books, unless they appear to have been made with fraudulent intent.

The conveyance by a merchant to his wife of a large amount of property, made at a time when he was heavily indebted in a losing business, and pressed by his creditors, and when a withdrawal of this amount of property from his assets was likely to prevent his meeting his obligations, cannot be supported by testimony that twenty years before his wife had advanced him money, without security or written obligation, under a simple verbal promise of repayment, which money he had invested in his own name and used to obtain credit in his business.

It appearing, however, that the cashier of the objecting creditor (a bank) had recovered judgment in his own name in a State court upon the claim proved by the bank; that he had afterwards filed a creditor's bill against the debtor and his wife, praying that these conveyances be set aside as a fraud upon creditors; that his bill was dismissed after a hearing upon the merits, and upon appeal to the Supreme Court this decree was affirmed,

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Held, That under these circumstances the matter was *res adjudicata* as between the objecting creditor and the bankrupt, and that the former was estopped to oppose his discharge.

Nor will the court of its own motion refuse a discharge, though it may appear that the bankrupt has committed an act which, if properly pleaded, would bar a discharge.

Creditors who have been duly notified, and make no opposition, are regarded as consenting to a discharge.

Where specifications are overruled upon grounds personal to the objecting creditor, time may be given to other creditors to appear and oppose a discharge.

In re JAMES S. ANTISDEL.

On specifications in opposition to discharge.

This case came up on the following objections of the Union City National Bank to the discharge of the bankrupt.

1. That he had wilfully and intentionally concealed his title to certain real estate and personal property which belonged to him, by having the same conveyed to his wife at a time when he was insolvent and knew himself to be so, and when he expected and contemplated proceedings in bankruptcy.

2. That the bankrupt, being a country merchant, did not keep proper books of account.

John Atkinson, for the bankrupt.

Alfred Russell, for the objecting creditor.

BROWN, J.—Substantially three objections are made to the bankrupt's books of account.

1. That they did not exhibit the condition of his business, that no trial balance could be made from them, and that Antisdal's individual account was unintelligible.

2. That there were unexplained mutilations and erasures.

3. That he had omitted to credit two or three small amounts, and had made false entries of advances to his wife.

With regard to the first objection, I fully concur in the opinion of Judge Longyear in the case of *In re Archenbrow* (12 N. B. R., 17), that the books of account of a merchant, whatever be their form and number, must be so kept as to give the creditors an intelligible idea of the business, and enable a competent accountant to ascertain the debtor's financial con-

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dition. If that be done, the form in which they are kept is of no importance; but if it be not done, then it is immaterial whether the omission was fraudulent or otherwise. The evidence of the experts upon the subject is somewhat conflicting—one testifying that a trial balance could not be made, and three that it could be. The books consist of a ledger, a cash-book, a journal or day-book, and are kept in the form in which the books of country merchants are ordinarily kept. While there may be errors in posting, which would prevent a balance being obtained, upon the first trial, I am satisfied that such balance could be obtained with no extraordinary effort, and that from an examination of these books a competent accountant could gain a correct idea of the bankrupt's business.

To sustain the second objection, I think it should be made to appear that the mutilations or erasures were fraudulent, and that the ruling in the case of *Re Archenbrow*, above cited, extends no further than to the form and nature of the books. (*In re Beatty*, 2 N. B. R., 582; *In re Pierson*, 10 N. B. R., 107; *In re Burgess*, 3 N. B. R., 196.) There are undoubtedly numerous erasures through these books, but all of them seem to have arisen from errors in the original entries, subsequently corrected by erasing the figures, and writing the corrected ones over them. There is not the slightest evidence of a fraudulent intent.

The third objection, that certain credits to which his customers were entitled were omitted and certain false entries made, is wholly unsupported by the testimony.

In support of the first specification, it was proven that on the 6th of August, 1873, the bankrupt conveyed directly to his wife, for the nominal consideration of two thousand dollars, about twenty acres of land in Union City; that on 7th of February, 1872, he conveyed to one Decker several lots in the same village, which were afterwards and on the 23d of July, 1873, conveyed by Decker to the bankrupt's wife, for the nominal consideration of three hundred dollars, the bankrupt at the same time discharging a mortgage of two hundred and seventy-five dollars, which he had taken from Decker upon the sale to

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him. He subsequently made another conveyance to his wife of land in Sherwood, and on 1st of January, 1875, gave her a bill of sale of certain lumber and stone, originally designed for a house to be erected upon the same land. It appeared that in 1869 the bankrupt went into partnership with one Leonard, buying a half-interest in the business for ten thousand dollars, without taking an inventory, or knowing the financial condition of the firm, except as he had obtained certain impressions with regard to the business from his having been assessor of taxes the year before. He supposed the firm was worth twenty thousand dollars, but never knew the amount of the indebtedness until the administrator of his deceased partner took an inventory in the season of 1874, Leonard having died 5th of August, 1874. Leonard had attended to the financial part of the business, and sometimes the bills "seemed to crowd them," as he expressed it. In 1873, when Antisdel conveyed his land in Union City to his wife, he owed the Union City National Bank, the objecting creditor, two thousand dollars. He then knew the firm was in debt from fifteen thousand dollars to eighteen thousand dollars. He had no recollection whether they had run behind or not the first or second years, though he remembers that once or twice Leonard made the remark that they were behind, and had not made anything—had even lost. It appears, however, that the merchandise account exceeded the sales without counting any profits, and at the end of the first year showed a loss of about one thousand dollars. At the end of the second year the inventory showed a loss of two thousand dollars of stock, with all the profits. His partner then, being persuaded from the accounts that the profits of the year should be some six or seven thousand dollars more than paying for the goods, decided to dissolve the firm, to which Antisdel at first consented, but afterwards proposed to withdraw from taking an active part in the business, and put a clerk in his place. The next year showed a margin of one thousand six hundred dollars in the profits, and from thence to the day that Leonard was taken sick and left the store the business was in better condition. After March, 1874, the

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management of the store was in the hands of Antisdel until a settlement was made in September, when the administrator found that the purchases exceeded the sales some six thousand dollars. When the inventory was taken shortly after Leonard's death, the assets footed up about twenty-two thousand dollars, and liabilities about eighteen thousand dollars. The bankrupt continued in business until March, 1875, when he sold out to one Watkins, the inventory at this time being about six thousand dollars.

The debt of two thousand dollars to the Union City National Bank was contracted before the conveyances were made by the bankrupt to his wife. The property stood in Antisdel's name at the time the loan was made to the firm of which he was a member, August 27, 1872, and the fact of his possessing this property was undoubtedly some inducement for making the loan. It was then believed to be worth between four and five thousand dollars. Allen, cashier of the bank, remonstrated with Antisdel when he learned of the transfers through the newspapers, when Antisdel remarked he ought to let his wife have the farm. Antisdel afterwards said Allen had abused him, and probably that would be the last claim that would be paid. One Bostwick testified his wife had a mortgage on the firm property, and the payments were due semi-annually; that after Leonard's death payments were not made on the mortgage, and when Bostwick applied to Antisdel for payment, he said he could not pay it, that there was no company money to pay it with, and he didn't calculate to pay it with his own money.

With regard to the personal property, one Scott testified that Antisdel took him to look at the lumber piled on the land in or near Union City, and asked him to buy it. He said he didn't want him to take the lumber and keep it, but he wanted him to take it; he wanted it for building purposes, and wanted him to give a note for it, and he would take it back and give up the note; they had got the lumber out for building a house and wanted to keep it for that purpose. That the firm of Leonard & Antisdel had got to pay their debts, and he did not

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propose that his private property should go to pay them. Scott recommended him to convey it to his wife. Antisdel doubted whether she could hold it from his creditors, but Scott thought she could if he owed her anything, and about a week after this he learned that Antisdel had given his wife a bill of sale for the lumber and stone.

In defence it was shown that Mrs. Antisdel in 1850 let her husband have eight hundred dollars inherited from her father's estate, and in 1853 four hundred dollars from her grandfather's estate, but she took no security, and no memorandum of the loan was made by either party. It appears, however, that Antisdel had promised to make good these loans to his wife, though before 1866 he had owned two farms in his own name without securing the loan to her. In 1866 he bought twenty-five acres in Union City, with the understanding that it should be conveyed to his wife, and the deeds made in her name, but by an accident this was not done, and it was not until August 6, 1873, that he conveyed this property to his wife. No explanation was given for the delay. In 1873 it was calculated that the one thousand two hundred dollars originally loaned amounted to about three thousand dollars, and these three conveyances were said to have been made in payment of this amount. The personal property consisted of building material intended for the house, which was upon the lot in 1873 when the conveyance of the land was made, and she agreed to take it at four hundred dollars, though the bill of sale was not made until January 1, 1875. Under Scott's testimony, however, I regard it as extremely improbable that any such agreement was made. Both parties testified that when these conveyances were made Antisdel believed himself entirely solvent, and had always met his paper at maturity. There is further testimony tending to show that his credit was good up to about the time of his bankruptcy, and there is no direct testimony that he was actually insolvent at the time they were made. He seems, however, to have been doing a losing business, had been pressed by his creditors, and if he were a man of ordinary business sagacity could hardly fail to have been aware that he had

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made a bad bargain in buying into the business, and that the partnership property would in the end be wholly insufficient to pay his liabilities.

The second subdivision of Section 5110 requires the court to refuse a discharge, "if the bankrupt has concealed any part of his estate or effects." This specification is satisfied by proof that the bankrupt has concealed his title to real estate, by leaving out of his schedules property that has been conveyed by him in fraud of his creditors. (*In re Huseman*, 2 N. B. R., 437; *In re Rathbone*, 1 Id., 536; 2 Id., 260; *In re W. D. Hill*, 1 Id., 431; *In re Goodridge*, 2 Id., 324.)

The facts in this case seem to me to fall within the ruling of the Supreme Court in *Humes v. Scruggs* (94 U. S., 22), and to establish a case of a conveyance made with intent to hinder, delay, and defraud creditors. The court in his case seems to me to establish a most salutary principle in holding that "if the money that a married woman might have had secured to her own use is allowed to go into the business of her husband, and to be mixed with his property, and is applied to the purchase of real estate for his advantage, or for the purpose of giving him credit in his business, and is thus used for a series of years, there being no specification when the same is purchased that such real estate shall be the property of the wife, the same becomes the property of the husband for the purpose of paying his debts; he cannot retain it until bankruptcy occurs and then convey it to his wife; such conveyance is in fraud of the just claims of the creditors of the husband." (See also *Phipps v. Sedgwick*, 16 N. B. R., 64; 95 U. S., 3.)

Putting the facts in this case in the most favorable light for the bankrupt, it appears that he received this money of his wife without giving her security, or any written evidence of the loan; that he held it in his possession for upwards of twenty years, having in the meantime purchased land which he might have conveyed to his wife in satisfaction of the debt, but which he held in his own name, and thereby acquired credit at the bank; that the loan was made, partly at least, upon the faith of this security, and that he made the convey-

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ance to his wife at a time when he was heavily indebted, and when a withdrawal of this amount of property from his assets was likely to embarrass him seriously in meeting his obligations. Although it does not appear that he had failed to meet his paper at that time, he continued embarrassed, and finally was compelled to wind up his business in a Court of Bankruptcy. This is regarded as sufficient evidence of insolvency as to existing creditors, whose debts remain unpaid. (Bump on Fraudulent Conveyances, 294.)

To hold that a member of a firm in embarrassed circumstances may convey all his individual property to his wife in payment of a debt barred by the statute of limitations for fourteen years is a premium upon fraud I am unwilling to offer. If such a transfer be sustainable at all, I think it should be made within a reasonable time, at least within the six years fixed by the statute.

But it appears by the record in this case that Charles T. Allen, Cashier of the Union City National Bank, the opposing creditor, in June, 1875, recovered a judgment in the Circuit Court for the County of Branch against the bankrupt for the debt which was proved by the bank in this court; that he afterwards filed a creditor's bill against Antidel and his wife, praying that these conveyances be set aside and declared to have been made in fraud of creditors; that the case went to a regular hearing upon pleadings and proofs, and his bill was dismissed, and upon appeal to the Supreme Court, the decree of the Circuit Court in that regard was affirmed. It is insisted that the objecting creditor is estopped by this decree to claim here that this conveyance was made in fraud of creditors.

Three replies are made to this defence:

-1. That the proceedings are not identical. A similar question arose in *Re Hussman* (2 N. B. R., 437), in which the opposing creditors pleaded a decree of a State court setting aside a similar conveyance as fraudulent in bar of a discharge, and the learned judge held it to be a case of *res adjudicata*. The question litigated in the State court was practically the same, and I see no reason why its judgment does not operate as an

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estoppel. (See *Downer v. Rowell*, 25 Vt., 336.) The cases of *Jones v. Milbank* (6 Lans., 73) and *Bradley v. Hunter* (50 Ala., 265) evidently have no application.

2. That the parties are not identical. But it appears distinctly by the testimony in this case, that Allen was cashier of the Union City National Bank, that the foundation of his suit was the debt proved by the bank in this case, and that it was brought by Allen in his own name as trustee for the bank. Under these circumstances it is quite clear there is an estoppel as between the defendant and the person for whose use the suit is brought. (Freeman on Judgments, Sec. 173; *Hodson v. McConnel*, 12 Ill., 170; *Peterson v. Lothrop*, 34 Penn., 223; *Calhoun v. Dunning*, 4 Dallas, 120; *Rogers v. Haines*, 3 Greenl., 362; *Boynton v. Willard*, 10 Pick., 166.)

3. That admitting the question is *res adjudicata* as between the opposing creditor and the bankrupt, it is insisted that the court is bound of its own motion to refuse a discharge, wherever it can see that the bankrupt has committed an act which if properly pleaded would bar a discharge. I know of but one case which tends to support this proposition, viz.: in *Re Wilkinson* (3 N. B. R., 286,) in which the court, upon inspecting the record of the bankrupt's examination by the assignee, discovered that he had lost a large sum of money in gambling, and refused a discharge, although creditors interposed no objection. The circumstances of this case were such as to appeal strongly to the discretion of the court. The question does not seem to have been argued, and the matter apparently did not receive any very careful consideration. The other cases cited by counsel lend no support at all to this proposition. In *Re Houghton* (10 N. B. R., 337), the only point considered was, whether the court could permit opposition to be made after the return day of the order to show cause, where a creditor, who ought to have considered himself the representative of all the creditors, had filed specifications of opposition, and then withdrew them. In the case of *In re Palmer* (14 N. B. R., 437), the bankrupt obtained the consent of a sufficient number to entitle him to his discharge, but desiring to obtain also the

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consent of another creditor, "to strengthen his application," he gave him a note for \$40 with security, and in consideration thereof the creditor signed his consent; another creditor opposed the discharge because of this transaction, and the learned chief justice held that, although there was a sufficient number and amount without this, he was still precluded from obtaining his discharge. It is true that he remarks in the course of his opinion that "the courts are as much bound by the provisions of the Act as the bankrupt himself, and if it appears in the regular course of the proceedings that an applicant for a discharge has failed in any particular to perform his duties as a bankrupt, the application must be refused." This language, however, must be considered in connection with the facts of the case, which were far from sustaining the position that the court is bound of its own motion to refuse a discharge. The better opinion seems to be, that creditors who have been duly notified, and make no opposition, are regarded as consenting to a discharge; and that the court will only consider whether the bankrupt has committed an act which would bar a discharge, upon specifications regularly filed in opposition thereto. (*Creditors v. Williams*, 4 N. B. R., 580; *In re Sullivan*, 1 Deady, 573; *In re Schuyler*, 2 N. B. R., 549; *In re Rosenfield*, Id., 117.)

The books are full of cases holding that the specifications must not be vague and general, but distinct, precise and specific, and so framed as to advise the bankrupt what facts he must be prepared to meet and resist. (*In re Rathbone*, 1 N. B. R., 294; *In re Hill*, Id., 257; *In re Hanson*, 2 Id., 211; *In re Waggoner*, 1 Ben., 532.)

But of what use all this particularity in framing an issue, if the court may disregard the issue thus framed, and refuse a discharge *mero motu* if it appears the bankrupt has committed any other act not covered by the specifications? Suppose there be a trial by jury upon the specifications; that upon such trial it should appear that the bankrupt had not committed the act alleged, or that a creditor was estopped to take advantage of it; but, that he had committed some other act which would

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bar his discharge; would the court be bound to refuse a discharge, notwithstanding the verdict of the jury that the specifications were not sustained? It seems to me that the statement of this proposition is its own answer. When the bankrupt has taken the required oath, I think a discharge should only be refused when some creditor has filed specifications of his opposition thereto upon which an issue can be joined, and the bankrupt be heard in his defence. I do not feel authorized in this case to refuse a discharge, but will direct it to be withheld for a few days to permit other creditors to intervene in case they should desire to do so. The point upon which these specifications are overruled is a technical one, and it may be that the court would permit other creditors who have awaited the result of this proceeding to intervene and take up these specifications in their own behalf.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

JULY 2, 1878.

A provision of a resolution of composition to the effect that upon the delivery of the composition notes all the property in the hands of a voluntary assignee of the bankrupts shall be delivered to them and the assignee discharged from responsibility is wholly nugatory so far as it purports to affect the assignee's responsibility, or the rights of creditors under the assignment, otherwise than as the confirmation of the composition and release of the creditors' claims by payment of the composition may necessarily affect them.

Confirmation of the resolution of composition does not give the assent of the court to what such provision vainly attempts to effect.

Confirmation of a resolution containing a provision that the proceedings in bankruptcy may be discontinued at any time after delivery of the notes does not bind the court to allow such discontinuance, unless sufficient grounds therefor are shown to exist when the application is made.

In re SOLOMON HYMAN and MOSES S. HYMAN.

B. F. Foster and Otto Horwitz, for motion.

Edward T. Bartlett, contra.

CHOATE, J.—Motion to confirm composition.

I do not feel at liberty to reverse the decision of the great majority of the creditors in this case—that the composition is

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for the best interests of creditors—on any of the grounds urged by the learned counsel for the opposing creditors.

The fifth resolution is objected to, which provides that upon the delivery of the composition notes all the property of the debtors which is or has been in the hands of the voluntary assignee of the debtors shall be delivered to the bankrupts, and the said assignee discharged from all responsibility under his office as assignee.

This resolution is wholly nugatory so far as it purports to affect the responsibility of the voluntary assignee, or the rights of creditors under the trusts of that assignment, by the proceedings in this court otherwise than as the confirmation of the composition, and the release of the claims of creditors by payment of the composition may necessarily affect them. But this resolution is not a substantive part of the proposal of composition which the creditors have accepted, and the confirmation of the resolutions does not give the assent of this court to what the fifth resolution vainly attempts to affect.

So the sixth resolution, which provides that any time after the delivery of the notes the proceedings in bankruptcy may be discontinued, does not, if the resolutions are confirmed, bind the court to allow such discontinuance, unless, when the same is applied for, sufficient grounds therefor shall be shown to exist.

Composition confirmed.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

AUGUST 15, 1878.

In composition proceedings, the debtor, though present, may, by a vote of the creditors present, be excused from examination on account of illness.

The fact that security provided for a composition does not certainly secure the full payment of the composition does not make the composition uncertain.

The circumstance that there is no security given for the payment of the composition notes is merely one of the facts in the case to be considered with

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and in the light of all the other facts on the question, whether the composition is for the best interests of all concerned.
On the question whether, the composition being in other respects fair and just, the debtor should be allowed to keep his property, the principal element is his personal and business character.
The question as to the time within which, and how rapidly the debtor can pay the composition, is one for the creditors to consider, and their judgment will not be reversed unless valid reasons for so doing are shown.

In re SAMUEL WILSON and THOMAS GREIG.

THE facts sufficiently appear in the opinion of the court.

G. A. Seixas and *W. B. Winterton*, for motion.

B. F. Foster, Foster & Adams, and *A. Blumensteil*,
contra.

CHOATE, J.—This is a motion for the confirmation of a composition.

There has been no adjudication, and the proceeding is upon creditors' petition. Thirty-four creditors out of forty-six have voted in favor of the composition.

Two creditors oppose the composition. Their debts amount to about thirteen thousand dollars.

The creditors who have voted for it represent about seventy-six thousand dollars of debts. The total debts are ninety-five thousand dollars.

Several objections are urged.

1. It is objected that one of the debtors (Greig), though present at the first meeting, was, by a vote of the creditors present, excused from examination on account of illness.

The statute provides, "The debtor, unless prevented by sickness, or other cause satisfactory to such meeting, shall be present at the same, and shall answer any inquiries made of him." It is now insisted that, though the creditors may excuse his attendance, they cannot excuse his answering questions, if present, though disabled by sickness. Mr. Greig's inability to proceed with the examination fully appeared. It is claimed that this is a fatal irregularity. This objection is frivolous.

The statute is clearly broad enough to sustain the action of the creditors in this respect.

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2. The composition proposed and accepted was thirty-five cents on the dollar in the debtors' promissory notes at three, six, nine, twelve, and fifteen months from the date of the order of confirmation, each for seven cents on the dollar.

It provided that the injunction restraining the debtors from disposing of their property should be vacated; that "in all other respects the proceedings in bankruptcy shall remain as they are now, and shall be deemed to be pending until the composition is completed, for the purpose of any application which the creditors, or any of them, may see fit to make upon the default of the debtors in the payment of any of the composition notes;" that upon payment of said notes the proceedings should be discontinued.

It contained also the following clause: "And for the purpose of better securing the payment of the several instalments of composition according to the tenor of the preceding resolutions, we do hereby farther resolve that James W. Jones, of the city of New York, be appointed custodian and special receiver of all the property and estate of the debtors. . . . And we do hereby request his appointment by this court as such receiver, provided, however, that such appointment shall be made subject to this limitation and restriction, that said Jones shall not take any of said property into his custody or possession until the said alleged bankrupts shall have defaulted in the payment of their composition notes, or any of them." The resolution then goes on to require a bond in ten thousand dollars from Mr. Jones, with sureties to be approved by the court, to secure the faithful performance of his duties as receiver. It is objected to this composition that it is fatally indefinite; that the security provided for is not certain in its character; that Jones as receiver or trustee would be obliged only to pay such sum as he should realize from the assets; that the provision for a receivership does not really secure the thirty-five per cent.

This objection cannot be sustained. The terms of the composition are definite and certain; thirty-five per cent in money secured by the promissory note of the debtors. The further provision for a receivership in a certain case is not of

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the substance of the composition. It is simply a request for certain action to be taken by the court in case of default. It may or may not be acted on without affecting in any way the composition. Even, however, if it were regarded as something to which the creditors were certainly entitled, it is not obnoxious to the objection of uncertainty.

If Jones should be appointed receiver in precisely the form prescribed in the resolutions, his powers and duties as such receiver would be well defined and certain.

The fact, if it be so, that security provided for a composition does not certainly secure the full payment of the composition, does not make the composition uncertain.

It may make the security or the composition notes less valuable than they would be if fully and beyond all question collaterally secured.

The case of *In re Reiman* (11 N. B. R., 21), cited in support of this objection, is not in point. There the composition notes were to be "satisfactorily endorsed," without providing by whom they were to be endorsed, or how or by whom it was to be determined whether the endorsement was "satisfactory."

This was of the very substance of the composition, and very properly it was held to be too indefinite. The difference between the two cases is too clear to need further comment.

3. But the principal objection taken is, that this composition is not for the best interests of creditors, because under it the whole property of the debtors is surrendered to them, and nothing is given to the creditors except promises to pay thirty-five cents on the dollar, with no security whatever, except the debtors' promises.

Neither the language of the Bankrupt Law, nor the construction that has been put upon it by the courts, prevents the acceptance of a composition merely because the assets are still in the possession of the debtor, or are restored to him by the terms of the composition, and the composition is wholly promissory in its character and without security. (See *In re Van Auken*, 14 N. B. R., 425; *Ex parte Hamlin*, 16 Id., 320.) The court must be satisfied that it is "for the best interest of

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all concerned." (Rev. Stat., Sec. 5103 A.) The circumstance, therefore, that there is no security given for the payment of the composition notes is merely one of the facts in the case to be considered with, and in the light of all the other facts on the question to be determined, whether the composition is for the best interests of all concerned.

In *Van Auken's* case above cited, it was said that the arrangement must be "judicious and reasonably safe to all the creditors." In this case it does not appear, nor is it urged, that the debtors are not proper persons, in character and business ability, to manage their own affairs, except so far as such incapacity may be necessarily inferred from their present insolvency, and there is no evidence impeaching their integrity. The overwhelming vote of the creditors that it is for their best interests that the debtors should continue to manage and dispose of their stock of goods, and go on with business in order to enable them to pay the promised composition, deserves very great weight with the court on this question.

It does not appear that the debtors are able to give any security except upon their stock of goods. To mortgage or pledge this might seriously impair their ability to realize on it, and to pay the composition.

It is not claimed that more than sixty-five cents on the dollar could be realized on the property of the debtors if wound up in bankruptcy. It is urged that the creditors are giving up sixty-five per cent., and getting nothing for it; that, therefore, the creditors are getting no equivalent for what they surrender, and that such an arrangement cannot be for their best interests, however it may be as to the best interests of the debtors. But it is not true that the creditors are giving up the sixty-five per cent. That is irrecoverably gone already. The debtors are admitted to be insolvent with assets insufficient to pay more than thirty-five cents on the dollar. What the creditors are giving up, or rather what is taken from them by this composition, is the right to have those assets administered by an assignee in bankruptcy, instead of being administered by the debtors themselves for the purpose of realizing their

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value. It cannot be said either that the creditors do not get any advantage by the composition besides that of having the debtors administer the estate, if that is one, as from the action of the creditors it may be inferred that the large majority of them believe it to be.

For a possibility of dividends uncertain in amount and time of payment, but very certainly not worth more than thirty-five cents on the dollar, represented in their hands by dishonored notes, they get paper for all that their claims are worth in a form in which they can negotiate and use it in their business, and with a reasonable certainty that it will be paid at maturity because backed up by property in the possession of the makers.

Thus the composition, if reasonably safe and judicious in what the debtors undertake to do, and fair in amount, is for the best interest of creditors in that it gives them liquidated and negotiable promises in place of unliquidated and unmerchable claims.

On the question whether, the composition being in other respects fair and just, the debtors should be allowed to keep their property, the principal element is their personal and business character, and on this point I am entirely satisfied.

In case of default either by the mode suggested by the creditors or by the issue of a warrant and the appointment of an assignee, the creditors still have the security of the assets. I think the composition is for the best interests of all concerned, and this objection of want of security is in this case not sustained.

4. It is also objected that there is unreasonable delay in this case, the debtors having fifteen months to pay thirty-five per cent.; whereas, it is said that the greater part of the value of the assets could be realized by an immediate sale.

It was a question for the creditors to consider within what time and how rapidly the debtors could pay the composition, and I see no reason to reverse their judgment. As to an immediate sale, that may well have been thought unwise, and likely to defeat the purpose in view, of enabling the debtors to

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go on with their business in order to pay the stipulated composition.

5. The objection that this being an involuntary case, and there being no adjudication, the proceedings may be at any time discontinued on the motion of the petitioning creditors, and thus the court be left powerless to enforce the composition in case of default, is not well founded. It is based on an imaginary danger.

Objections overruled, and composition confirmed.

COURT OF APPEALS—KENTUCKY.

OCTOBER 3, 1877.

Where a creditor, who has knowledge of his debtor's insolvent condition, accepts payment of his debt, in fraud of the Bankrupt Law, without the consent of the surety or indorser, the latter is thereby discharged from liability, although the assignee of the debtor subsequently recovers back such fraudulent payment.

NORTHERN BANK OF KENTUCKY v. COOKE.

THIS action was brought by appellant against appellee as indorser of a bill of exchange drawn by one Wellman.

The facts appear fully in the opinion.

Barret & Brown and Bullock & Anderson, for appellant.

First. That part of the decision in *Bartholow v. Bean* (10 N. B. R., 241, 18 Wall., 635) that the creditor must, in refunding to the bankrupt's assignee, lose also his right of action against the indorser of the note, or that a void payment by the acceptor out of his own funds is such a payment as releases forever the indorser of a protested paper, is purely *obiter dictum*—is neither authorized by the facts, nor necessary to the case, nor binding as authority. The contrary was held in a case where the question came up directly, in *Ahl, assignee, v.*

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Thorner (3 N. B. R., 118). It was no fraud in the banker to accept payment when tendered by the acceptor, and it inured to the benefit of the indorser.

Second. The appellee is estopped in this case from making the defense asserted by him, (1.) by procuring the payment to be made; (2.) by concealing his knowledge of the facts from the bank; (3.) by his suggesting the payment, and thereby causing it to be made.

Third. Sections 35 and 39 of the Bankrupt Law only declared that such payments were *void*, and that the assignee might recover back by suit. The assignee can recover, because the payment by way of preference was *void*. A *void* payment is no payment. The payment to the bank by the bankrupt was found to be a *void payment*; it was therefore no payment, and if no payment, the indorser was not thereby released, and in no event should he be held to be released when, as in this case, he suggested and caused the void payment to be made.

H. B. Cooke, for appellee.

If the bank, by receiving the payment, had not deprived Cooke of his remedy over against Duerson, Cooke would be liable to the bank.

The claim cannot be proved against the bankrupt's estate, since Section 23 of the Bankrupt Act declares that a claim paid as this was shall not be proved up until the money is surrendered to the assignee, which the bank never did, but was forced to do so by law.

If the payment was void, as contended by appellant, the bank would be a *bona fide* creditor of the bankrupt, and could prove up its claim, but it is prevented from proving this claim by said Section 23.

By refusing to surrender the money to the assignee, the bank deprived itself and the indorser Cooke of its and his remedy and right to prove the claim against the bankrupt's estate.

The judgment in favor of the assignee against the bank is

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conclusive evidence that it committed a fraud by receiving the payment.

"In all cases where an insolvent pays or secures a creditor to the exclusion of others, and the creditor is aware that it is so when he receives the preference, he must run the risk of the debtor's continuance in business for four months." (*Bean v. Brookmire*, 4 N. B. R., 196, 201.)

The contract of an indorser is an implied one, and the Bankrupt Law does not add to or take anything from it. A release of the acceptor by the holder extinguishes all right of recovery upon the bill, not only against the acceptor, but all the antecedent parties.

I. & J. Caldwell and Winston, for appellee.

The appellant's petition does not allege payment by Cooke's procurement, or with his knowledge or consent, or at his request, or that he knew Duerson to be insolvent.

It was not the duty of the bank to receive the fraudulent payment; it was not its duty to take money to which it knew it would not get good title. On the contrary, it ought to have obeyed the law by refusing to receive the money. See *Bartholow v. Bean* (10 N. B. R., 241, 18 Wall., 635), a case sound in principle and unanswerable in argument.

This action could not be maintained at common law, and cannot be sustained except as a result of the Bankrupt Act. The decision of the court below cannot be reversed without disregarding the case of *Bartholow v. Bean* (10 N. B. R., 241, 18 Wall., 635).

LINDSAY, C. J.—F. C. Wellman drew his bill of exchange addressed to W. F. Duerson, requesting him to pay Parks, four months after date, the sum of two thousand five hundred dollars at the First National Bank at Jeffersonville, Indiana. The bill was accepted by Duerson, and sold by Parks to George B. Cooke, and by him sold and indorsed to the Northern Bank of Kentucky. It was not paid at maturity, and was duly protested,

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and all necessary steps taken to hold the drawer and indorsers liable to the holder.

Some time after the dishonor of the bill it was paid off and taken up by the acceptor, Duerson. Within four months next after this payment Duerson was adjudged a bankrupt on the petition of one of his creditors, and in a short time thereafter Gardner, his assignee, instituted his action in the U. S. District Court, sitting as a Court of Bankruptcy, against the Northern Bank, and charged in substance that Duerson was insolvent when he paid the bill; that he made the payment with a view to prefer the bank; and that it then had reasonable ground to believe he was insolvent, and intended to give it a preference, contrary to the provisions of Section 35 of the Bankrupt Act. Upon issue joined as to whether the bank did have reasonable ground to believe that Duerson was insolvent, and that the payment was made in fraud of the Bankrupt Act, a trial was had, and the bank was adjudged to pay, and did pay, the sum received from Duerson to his assignee.

It therefore instituted this action against Cooke, who sold and indorsed the bill of exchange to it, and set up all these facts, and insists that the payment of Duerson was void in law, and, therefore, no payment at all, and that Cooke is still bound to it on his contract as indorser. He defends, and denies that the payment by Duerson was void, and insists that the bank voluntarily accepted it in violation of law, and thereby suspended his right to indemnify himself out of the estate of Duerson, for whom he was bound as surety, as well as out of the estates of the payee and maker of the bill, and thus released him from his liability as indorser.

The Court of Common Pleas adopted this view of the law, and instructed the jury to find for Cooke, and the bank has appealed to this court.

A case, in its leading feature very similar to this, was decided by the Supreme Court of Iowa in the summer of 1876. That court held that the creditor should be regarded as receiving payment from the principal debtor with the intent rather to protect than to injure the surety; and that although the ac-

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ceptance of payment by the creditor from his bankrupt debtor may mislead a surety to his injury, it will be the surety's misfortune; and if the creditor acts in good faith and is without fault, the surety will not be relieved in case the debtor is thrown into bankruptcy, and the payment recovered back by his assignee. (*Watson v. Poague* 15 N. B. R., 473; 42 Iowa, 582.) It is a little remarkable that neither the court, nor the counsel engaged in that cause, refer to the case of *Bartholow v. Bean* (10 N. B. R., 241; 18 Wall., 635), decided by the Supreme Court of the United States in 1875. In that case the opposite doctrine was announced, the court saying that in such a case it is the duty of the creditor, made so by the Bankrupt Act, to refuse to receive the proffered payment; and that the right of a surety to set up a tender by the debtor, and refusal by the creditor to receive payment as a defense to an action against him, would not be sustained by any court of law or equity. Counsel for appellant maintain that this ruling is a dictum, and therefore not to be regarded as an authority. The direct question was not involved, but it was certainly pertinent to the main question in issue in the case, and may be presumed to have received the serious consideration of the court. But we incline to regard the doctrine as too broadly stated, and do not concur fully with the conclusion reached in either of these cases.

The judgment in favor of the assignee of Duerson is essential to establish that the bank was compelled to refund the money paid in by the bankrupt, and without establishing that material fact it has no foundation whatever for its claim against Cooke. But said judgment establishes conclusively the further fact that the payment from Duerson was accepted with implied notice of his insolvency, and of his intention to defraud the Bankrupt Act.

In view of these facts the bank was not bound absolutely to become the beneficiary of the intended disregard of law. Neither was it bound absolutely to refuse to accept the proffered payment. Its acceptance would not have involved the commission of an actual fraud, but the mere obtaining of a

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preference which it could not hold in a given contingency. But it could not be compelled to take the risk of being able to justify its refusal in case the debtor should not within the prescribed time be adjudged a bankrupt. The peculiar provisions of the Bankrupt Law must be regarded as changing, in cases like this, the obligations due from a creditor to the sureties of his insolvent debtor. Here it was the duty of the bank to communicate to Cooke the facts within its knowledge before finally acting on Duerson's offer to pay. If it had so communicated this knowledge, and Cooke had then declined to advise it as to the course it should pursue, it might have refused to accept payment; or, if he insisted on a different course, it might have accepted it, and he would undoubtedly have been precluded from setting up the defense now relied on. But when, without his consent, the payment was accepted, to obtain an inhibited preference, and he thereby disabled, for the time being, from taking steps to indemnify himself, either by proceeding against the drawer or payee of the bill, or out of the estate of the bankrupt, he was released from his obligation to the bank as indorser.

There is no allegation and no sufficient proof that the bank was influenced to act by Cooke. Therefore, in view of the law and facts of the case, the peremptory instruction in favor of the appellee was proper.

Judgment affirmed.

SUPREME COURT—INDIANA.

NOVEMBER TERM, 1877.

Where a resolution of composition provides that it shall be consummated within a limited time or be void, *Held*, That such agreement was not absolute, but would be void if not consummated as to *all* of the creditors within the time limited.

Where, in an action by a creditor upon his original claim, the defendant set up as an answer such composition agreement, and that he had performed such agreement as to plaintiff within the time specified, *Held*, That the

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answer was insufficient for want of an averment that such agreement was duly consummated as to *all* the creditors.

EVANS et al. v. GALLANTINE.

THE facts fully appear in the opinion.

C. H. Reeve, B. Harrison, C. C. Hines and W. H. H. Miller, for appellants.

A. C. Capron and A. B. Capron, for appellee.

Howe, J.—The appellants, as plaintiffs, sued the appellee, as defendant, in the court below to recover a balance alleged to be due on an open account for goods sold and delivered by the appellants to the appellee, and interest thereon.

The complaint was in two paragraphs, but the cause of action was substantially the same in both paragraphs.

For answer to appellants' complaint, the appellee said, in substance, that he admitted that he was, on the eighth day of February, 1871, indebted to the appellants on account, as set forth in their bill of items in this action, in the sum of eight hundred and seventy dollars and thirty-two cents; but he averred that prior to said time, and after he had become so indebted to the appellants, the appellee's financial affairs had become somewhat involved, and he was in embarrassed circumstances; that proceedings in bankruptcy had been instituted against him in the District Court of the United States for the district of Indiana, in which district he resided, by John V. Farwell & Co., who were his creditors; that in order to avoid litigation, and in order to prevent his estate from passing into the hands of an assignee in bankruptcy, the appellee offered a large number of his creditors, including the appellants and the petitioning creditors in the bankruptcy case, to pay or secure to his said creditors fifty cents on the dollar on their respective claims, in consideration of which said creditors should accept said one-half of their claims as a full and complete adjustment and satisfaction of their several claims; that said offer led to negotiations which finally terminated in a

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written agreement on the part of the appellants and certain other creditors of the appellee, a copy of which agreement was filed with and made part of said answer, by which the appellants agreed to accept fifty cents on the dollar, of said appellee, in full settlement and satisfaction of their said claim, the same to be paid by the appellee in certain instalments secured by note, as set forth in said agreement, and the appellee averred that he did, within the thirty days specified in said agreement, execute and deliver to the appellants his promissory notes, with security to their approval, due at nine months, drawing ten per cent. interest, to the amount of two hundred and twenty-one dollars and eleven cents, and also paid the appellants the sum of two hundred and fourteen dollars and five cents in cash; which said notes and cash were taken and received in full satisfaction of the account sued on in this action. Wherefore the appellee said that the appellants ought to take nothing by their said action, and he prayed judgment for costs.

The agreement, which was filed with and made part of appellee's answer in this action, appears to have been executed by the appellants and thirteen other individual, partnership, or corporate creditors of the appellee. Omitting the signatures thereto, we set out this agreement, as necessary to a proper understanding of some of the questions which arise in this action. This agreement was as follows:

"We, the undersigned creditors of N. W. Galentine, of Bourbon, Indiana, hereby agree to accept fifty cents on the dollar for our respective claims against him, in full settlement, the same to be paid in three, six, and nine months from the date hereof, with ten per cent. interest, to be secured by notes with good approved security. This is to be consummated within thirty days, otherwise void.

"Chicago, February 8, 1871."

The appellants demurred to appellee's said answer, for the alleged insufficiency of the facts therein to constitute a defense to this action, which demurrer was overruled by the

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court below, and the appellants excepted to this decision, and the appellants replied in three paragraphs to appellee's answer. The first paragraph being a general denial, and each of the other two containing affirmative averments, which require no special notice.

The issues joined were tried by a jury in the court below, and a verdict was returned for the defendant, the appellee. Appellants' motion for a new trial was overruled, and their exception saved to this decision, and judgment was rendered on the verdict. The appellants have assigned in this court the following alleged errors of the court below :

First. In overruling their demurrer to appellant's answer, and, *Second.* In overruling their motion for a new trial.

It seems very clear to us that the facts stated in appellee's answer were not sufficient to constitute a defence to appellants' action. Appellee's learned attorneys, in our opinion, have misapprehended the force, effect, and meaning of the agreement for composition, which agreement constitutes the basis of appellee's answer. It is manifest from the averments of the answer that the agreement in question was regarded by appellee's counsel as simply an agreement between the appellee and the appellants only, and the answer was framed accordingly. Such was not the agreement which the appellee made a part of his answer. As we have already seen, this agreement was executed not only by the appellants but by thirteen others of the appellee's creditors. And of these other creditors it would seem from the record that all save one had signed the agreement before it was executed by the appellants.

In the case of *Breck v. Cole* (4 Sandf., 79), it was well said by DUER, J.: "Every composition deed is in its spirit, if not in its terms, an agreement between the creditors themselves as well as between them and the debtor. It is an agreement that each shall receive the sum or the security which the deed stipulates to be paid or given, and nothing more, and that upon this consideration the debtor shall be wholly discharged from all the debts then owing to the creditors who signed the

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deed." (*Britten v. Hughes*, 5 Bing., 460, and *Huntington v. Clark*, 39 Conn., 540.)

And the same doctrine is recognized and fully approved in *Perkins v. Lockwood* (100 Mass., 249), in *Bean v. Amsinck* (8 N. B. R., 228; 10 Blatchf., 861), in *Pinneo v. Higgins* (12 Abb. Pr., 334), and in *Kahn v. Gumberts* (9 Ind., 430).

In the case now before us the agreement counted upon by the appellee in his answer as a bar to the appellant's action was an agreement between the appellee on one side, and not only the appellants, but also all the creditors of the appellee who have signed said agreement, on the other side. It was expressly stipulated in said agreement, not only as applicable to the appellants, but also to all of the appellee's creditors who were parties to said agreement, that it should "be consummated within thirty days," and if it should not be consummated within the time aforesaid, then it should be "void." This, in our opinion, is the plain legal meaning of the said agreement. The agreement was not absolute on its face. To make the agreement valid and binding on all, or any of the appellee's creditors who had signed the same, it was indispensable, as we construe the instrument, that it should be fully consummated by the appellee as to each and all of the subscribing creditors within the time limited. If not thus consummated by the appellee as to each and all of his creditors, the agreement, by its express terms, was to be void. If the agreement was not consummated as to any one of the subscribing creditors within the time limited it is perfectly clear, we think, that as to such creditor it would be void and of no binding force. And if the agreement was void as to any one of the subscribing creditors it necessarily follows, in our opinion, from the peculiar character of the instrument, that it would be void as to all the creditors.

When, therefore, the appellee set up his composition agreement with his creditors as a complete defence to the appellants' cause of action, it was indispensably necessary to the sufficiency and validity of his answer that he should aver therein the full consummation of said agreement within the time

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limited therein. No such averment as this is to be found in appellee's answer in this action. Evidently the theory of the appellee's answer is that the agreement set out therein was an agreement between the appellee and the appellants only, with which the other subscribing creditors of the appellee had nothing whatever to do. But, even upon this theory, the averments of appellee's answer were clearly insufficient; for it was not averred that even as between the appellee and the appellants only the composition agreement was consummated within the time limited therein.

But we need not pursue this question. We are very clearly of the opinion that the averments of the appellee's answer were insufficient, and for this reason we hold that the court below erred in overruling the appellants' demurrer to said answer. The conclusion we have reached in regard to the insufficiency of the appellee's answer renders it unnecessary for us to go into a lengthy or detailed examination of the question presented by the alleged error of the court below in overruling the appellants' motion for a new trial. Many causes for such new trial were assigned by the appellants, consisting chiefly of alleged errors of law occurring at the trial and excepted to by the appellants. Several of these alleged errors of law, in our opinion, were well assigned. It is manifest, we think, from the instructions of the court below, of its own motion, to the jury trying the cause, that the court in instructing the jury had the same erroneous views of the force and effect of the composition agreement set up in the answer which the court must have entertained when the appellants' demurrer to the answer was overruled.

In our opinion, the court below erred in instructing the jury in effect that the terms of the composition agreement might be waived or controlled by a subsequent verbal agreement between the appellants and the appellee, when no such verbal agreement had been set up, or was relied upon in appellee's answer. The instructions of the court below on this point, it seems to us, were foreign to and outside of the case made by the pleadings.

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It is unnecessary for us, however, to examine and consider the alleged errors of law occurring at the trial. Our decision in relation to the sufficiency of appellee's answer will lead to the formation of other and different issues and a new trial of this cause. And it may well be that on such new trial none of the alleged errors of law now complained of by the appellants will again occur.

The judgment is reversed, at the appellee's cost, and the cause is remanded, with instructions to sustain appellants' demurrer to appellee's answer, and for further proceedings in accordance with this opinion.

COURT OF APPEALS—KENTUCKY.

SEPTEMBER 20, 1877.

While a promise, made *after* receiving a discharge in bankruptcy, to pay a debt from which the promissor has been discharged is valid, such promise made *before* the discharge has been obtained is without consideration and cannot be enforced.

OGDEN et al. v. REDD.

Action upon a promissory note made by appellee. The facts sufficiently appear in the opinion.

Fenton Sims, for appellants.

1. The moral obligation of a bankrupt to pay a debt, notwithstanding his discharge, is a sufficient consideration for a new promise to pay a debt created before the filing of his petition in bankruptcy. (*Graham v. Hunt*, 8 B. Mon., 7; *Egbert v. McMichael*, 9 id., 44.)

2. A conditional promise to pay "when convenient" is sufficient and enforceable. (*Mason v. Hughart*, 9 B. Mon., 430; *Kingston v. Wharton*, 3 S. & R., 208.)

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James B. Garnett, for appellee.

1. This action is upon the original note, from which appellee had been discharged in bankruptcy. It should have been upon the alleged new promise. (*Egbert v. McMichael*, 9 B. Mon., 44; *Carson v. Osborn*, 10 Id., 155; *Shippey v. Henderson*, 14 Johns., 178; *Bell v. Morrison*, 1 Pet., 351.)

2. The court below properly refused to allow the amended petition to be filed. It attempted to set up a new and distinct cause of action.

3. There is no consideration for a new promise to pay a subsisting debt. There is no consideration for the promise of a bankrupt to pay a debt' theretofore created made after filing his petition but before receiving his discharge in bankruptcy. There can be no such thing as reviving a subsisting debt. A new promise is only available when made to pay a debt from which the promisor had been released. A bankrupt is not released until he receives his discharge, and therefore his previous debts are subsisting up to that time.

COPER, J.—The appellee, on the 1st of January, 1866, executed to the female appellant his note for three hundred dollars, payable 25th of December of that year. August 31, 1868, he filed his petition in bankruptcy, and August 7, 1871, received his discharge. November 14, 1870, he wrote to the appellant that he would pay the note as soon as convenient, or as soon as he could spare the amount from his business. This suit was on the note, and the new promise contained in the letter was attempted to be set up in an amendment.

That a promise made after receiving a discharge in bankruptcy to pay a debt from which the promisor has been discharged is valid, is now well established; but in this case the new promise was made before a discharge had been obtained, and therefore, while the amount was a valid and subsisting obligation, the new promise did not discharge the obligation created by the note, and there was no consideration to uphold it.

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If the appellee is bound upon the mere promise it must have been binding when it was made, and that it was not then binding is clear from the consideration that if a discharge had not been obtained an action on the note could not have been defeated by setting up the new promise as an accord and satisfaction. It is not alleged or claimed that the promise in the letter was accepted in satisfaction of the note, and consequently it did not discharge the appellee from the obligation created by it. As long as the creditor can maintain an action on the original promise, a new promise, without additional consideration, will not support an action; otherwise the debtor would be exposed to two actions for the same debt. The amended petition did not, therefore, contain a statement of facts constituting a cause of action, and the court properly refused leave to file it.

Judgment affirmed.

SUPREME COURT—DISTRICT OF COLUMBIA.

A publisher of a weekly newspaper is not a "manufacturer" within the meaning of the Bankrupt Act.

A petition, based upon a failure by the alleged bankrupt as a manufacturer to pay his promissory notes, which does not allege that such notes were made or passed in his alleged business as manufacturer, is defective.

In re THE CAPITAL PUBLISHING CO.

THIS was an involuntary petition to have the Capital Publishing Co. declared bankrupt on the ground that it had suspended payment of its commercial paper, and had failed to resume payment within fourteen days.

W. D. Davidge and *Fred. W. Jones*, for petitioning creditor.

The only question to be decided is whether or not the alleged bankrupt corporation is a "manufacturer," within the

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meaning of the Bankrupt Act. The opinion of the District Court was that it was not a manufacturer, and therefore not liable to be adjudged a bankrupt.

But one decision exactly in point can be found in the *published* bankruptcy reports, and this is the case of *In re Kenyon & Fenton* (6 N. B. R., 238), in which the court says:

"The printing and publishing of a daily newspaper is manufacturing, in the strict sense of the law. A newspaper publication is as much the result of manufacture as that of books, or cards, or billheads."

The weekly newspaper, the manufacture of which is the only business of the defendant, is an *unbound book* of eight pages, and contains more reading matter than many bound "books," especially those called juvenile books.

The alleged bankrupt is not a "trader," because the decisions are numerous and harmonious in their construction of the word, and are all embodied in the definition of the word "trader," as follows:

In Bouvier's Law Dictionary (14th ed., 1876).

"One who makes it his business to buy merchandise, or goods, or chattels, and to sell the same for the purpose of making a profit."

A *trader* bestows no labor upon an article to give it an increased value, but sells it in the same condition in which it was bought, and this, it is asserted, is the principal feature distinguishing "traders" from "manufacturers."

It will scarcely be denied that a person who should purchase sole leather from one person, upper leather from another, thread and wax from another, nails and pegs from another, tools and implements from another, and by the use of the tools and materials thus gathered and contribution of manual labor, makes a shoe or boot for the purpose of sale, is a "manufacturer" within the meaning of the law.

What does the alleged bankrupt do, and what is its business? Its charter states:

"To carry on the business of printing and publishing a

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newspaper called the 'Capital,' and all business connected therewith, and such other business as ordinarily appertains to the printing and publishing a newspaper."

To carry on this business it must purchase types from a type founder, type cases from a carpenter or case maker, a printing press from a press maker, blank paper from a paper manufacturer; employ editors and writers to furnish reading matter, printers to set the types, pressmen to do the printing; and, by the combination of all these, makes or manufactures a "newspaper" for the purpose of selling the same. It makes "a new combination of old materials, constituting a new result or production in the form of a vendible article," precisely within the definition in Bouvier's Law Dictionary (14th ed.), title, Patents.

R. T. Merrick, and Henry Wise Garnett, for alleged bankrupt.

The burden of proof is upon the appellant. In this case he states and claims that the appellee is a manufacturer within the meaning of the Bankrupt Act; he must therefore prove that it is such a manufacturer. In this case he has clearly failed. How is he to prove it? Not, I submit, by technical definitions of the word manufacturer, but upon a construction of the word as taken in its connection with other words in the statute. The counsel for the appellant have exhausted the dictionaries in their search for dictionary definitions of the word manufacturer taken simply and alone. It is not by tying ourselves down to the mere naked definition of a word that we can arrive at the meaning of the law. If we were to accept the interpretation the counsel for the appellant desire to put upon this law, the simple act of whittling a tooth-pick would make the whittler a manufacturer within the meaning of the Bankrupt Law. This is not the spirit with which the law is to be construed.

The compulsory or involuntary clause in the Bankrupt Law is in the nature of a penal statute, and is therefore to be con-

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strued with the greatest strictness. It is a harsh, summary proceeding, which is not to be favored or extended beyond the narrow boundaries within which it has been confined; indeed, compulsory bankruptcy has been opposed by some of the greatest minds of this country as inexpedient and not in harmony with the spirit of our institutions. In the debate on the Bankrupt Bill of 1841, Mr. Webster, Mr. Calhoun, and Mr. Clay all took these grounds, and, with many illustrious companions, opposed and voted against the compulsory clause in that bill. And the present act shows the distinction intended between voluntary and involuntary bankruptcy, for while any resident of the United States owing three hundred dollars of debt can become a voluntary bankrupt, only in a few limited instances is the compulsory feature of the law allowed to operate and become effective.

In England, since the Act of 1861, all debtors, whether traders or non-traders, are liable to bankruptcy; but the temper and spirit of our law is different, and with us this severe and dangerous liability is bounded and circumscribed with the greatest care, and regarded with no favor beyond that which the closest construction of the law compels.

This being the spirit of the law, I submit that the appellee is not a manufacturer within the meaning of that law.

If I take a sheet of paper, and with pen and ink write certain characters upon it, I have, according to the dictionaries of the appellant's counsel, manufactured a letter, for I have applied the art of writing and the labor of penmanship to the paper, and by my *hand* I have *made* a letter. And yet this would not be manufacturing within the meaning of the Bankrupt Law. Going a step further, suppose I re-write the letter a number of times and sell the copies, still I would not be liable to be declared a bankrupt, as a manufacturer. If, instead of re-writing this letter, I see fit to buy a press and employ printers to print it for me, I am still not a manufacturer within the meaning of the Bankrupt Law. But, say the counsel for the appellant, you are a manufacturer, for you buy paper and print your letter on it. But the reply to this is, I make no

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change in the paper ; it is merely an incident. I only use it for the purpose of writing or printing on it such ideas or statements as are contained in my letter ; it is these ideas or statements that the public buy—not manufactured paper. The paper is a matter of indifference ; it is only the material on which it is most convenient to mark or print the characters which express the ideas, or convey the intelligence, which could be written or printed on many other substances as well as paper. If, then, I have not changed the nature of any article, and have made nothing by my hand, or the hands of my employees, except a record of my ideas or the information I desire to give, upon a substance which remained the same after the record as it was before, I do not come within the meaning of the Bankrupt Law, when it uses the word “manu-
facturer.”

The Bankrupt Law was passed for the relief of business men. It was and is a business—a commercial measure. It was made for bankers, merchants, traders, miners, and manufacturers, in a business acceptation of the term, which certainly does not embrace the publication of a newspaper, which, as we have seen, is defined to be a “sheet of paper printed and published at stated intervals for conveying intelligence of passing events.” The newspaper is the medium of the conveyance of intelligence and ideas, for the exchange of thought. It is the surest protector of the liberties of the people, for its vital breath is the air of freedom, and it reaches its highest perfection only in those countries where that air is purest. The press moulds public opinion, and, by the universal intelligence which it diffuses, prevents covert attacks upon our liberties. It is the great educator of the masses, and at the same time the reflector of their sentiments. Many of our people depend upon their newspaper for their knowledge of the political measures upon which they are called to cast their votes ; its power is felt and respected by the law-maker, for he knows that through its columns his every action is held up before the scrutinizing eyes of his constituents for their criticism or approval.

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MAC ARTHUR, J.—This is a petition in bankruptcy to have the Capital Publishing Company declared an involuntary bankrupt. The petition was filed June 14, 1877, and after an answer had been put in by the company, the petitioning creditor, George Hill, Jr., obtained leave to amend his original petition by striking out the word "trader" and inserting "manufacturer" in lieu thereof. So that the petition as amended charged that the company, on the twenty-eighth day of April, 1877, being a manufacturer, omitted to pay its promissory note dated March 26th, 1877, and payable thirty days after date, with interest at the rate of eight per centum per annum, but suffered the same to be and remain unpaid and be protested for non-payment, and still omits, refuses, and neglects to pay the same; said note being for the sum of three hundred and ninety-five dollars, and forty-five cents, and being commercial paper, and so has suspended payment of its commercial paper, and has not resumed payment within a period of fourteen days.

The company demurred to the petition as amended, on the ground that the company was not a manufacturer within the meaning of the Bankrupt Act, and therefore not capable of being declared a bankrupt; and that the petition of the appellant was defective for the reason that it has nowhere alleged that the promissory notes referred to in it were or are the commercial paper of the company made or passed in the course of its business as a manufacturer.

The petition describes the alleged bankrupt to be a corporation, organized under and by virtue of the Acts of Congress in such case made and provided, in the District of Columbia, which for a period of six months has had its habitat and carried on business at the city of Washington, in the District aforesaid. The point was raised on the argument that the demurrer admitted the company was a manufacturer. But in determining this question we may properly look at the act of incorporation thus referred to in the petition. The certificate of incorporation describes the object of the company in the following words: "To carry on the business of printing

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and publishing a newspaper called the Capital, and all business connected therewith, and such other business as ordinarily appertains to the printing and publishing a newspaper."

The first question raised upon the demurrer is whether the company is a manufacturer within the meaning of the Bankrupt Act.

Words in a statute are to be taken in their ordinary and familiar signification, and regard is to be had to their general and popular use. The court will presume that they were used to express their meaning in common usage. Keeping in mind this rule of interpretation, we can determine the judicial construction to be placed upon the word "manufacturer" when it is used in the Bankrupt Law.

There can be no doubt but the word "manufacturer" was used in the statute in the limited sense in which it is commonly understood. The agriculturist is engaged in the most extensive industry of this or any other country, and he brings to the market many commodities which are produced without the direct aid of the soil, or of the vegetative powers of nature, but he is never spoken of in common parlance as a manufacturer. The industries to which the dictionaries and the writers on political economy limit this term are where the raw materials or natural substances are wrought by hand, art, or machinery into commodities for use; and the examples given are cloths, iron, shoes, cabinet work, glass, cotton, and silk goods, etc. This limitation of the term manufacturer is to be adopted as the true meaning of the Bankrupt Law. Perhaps there is no substantial difference between the various branches of industry in any respect, except only in regard to the different processes which they employ. To manufacture is to change and modify natural substances so that they become articles of value and use. Chantrey was in the habit of receiving three thousand dollars for a single bust; Bierstadt, twenty-five thousand dollars for a single picture, and the representation of Lincoln's cabinet was purchased at a cost of twenty thousand dollars, and presented by a noble-hearted American lady to the Congress of the United States. These are called works of

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art, but in a legitimate sense they may be comprised among the productions of manufacturing industry. The artists use material and natural substances. They oftentimes employ a variety of subordinates. They work with their hands, and perfect an article of great pecuniary value. It symbolizes their art and genius. In a word, the artist accomplishes all that is implied by, but he is never included in, the term manufacturer. The definitions and rules which obtain in the Patent Office are not applicable here. A newspaper is not regarded as a manufacture any more than a painting, and an editor a manufacturer as little as an artist. We have been referred to the case *In re Kenyon & Fenton*, decided by the Supreme Court of Utah. It was a case where the bankrupts carried on the business of printing blank books, cards, billheads, in addition to which they published a paper, and the petition alleged that they published a newspaper, and "are manufacturers of books, cards, billheads," etc. And the court say:

"Though it is not necessary to decide that the printing and publishing of a daily newspaper is manufacturing in the strict sense of the law, yet my brother judges have *expressed the opinion that it would be*, and I am *inclined* to the same conviction."

It will be observed that the decision is placed upon the ground of the bankrupts being manufacturers of books, billheads, etc., and in this respect they were undoubtedly within the meaning of the act. Having come to this conclusion, the court further say that it is not necessary to decide that the publishing of a newspaper is manufacturing within the strict sense of the law, but express the opinion "that it would be." No more weight can be given to this voluntary case, than to any other conditional *obiter dictum*. It might be respectfully suggested that the substantial difference between the strict sense of the term "manufacturer" in the abstract and the strict sense it is to receive in the law has been overlooked in this decision. We have already stated the proposition that every branch of industry which converts any material or substance into useful commodities, strictly speaking, comes under

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the term manufactures, and in that sense a newspaper or a painting would be included. But we are of opinion that this is not the strict sense of the statute, which only includes those industries which commonly pass under that designation. This is an important distinction; for while all employments rest upon the same faculty in man to labor, to contrive, and to mould the refractory elements of matter, common usage and the convenience of society have given a limited signification to the word. The rule already adverted to for the interpretation of statute law limits its import to the sense in which it is usually received. Now no definition of the word manufacturer has ever included the publisher of a weekly newspaper, and the common understanding of mankind excludes it. You may reason by analogy, or reason from the nature of things, that it is; and so you may do the same thing with anybody who labors himself or employs others. But surely a Bankrupt Law is not to be expanded to cover every employment. It was by express terms limited to certain classes, who are designated by names well known in the business world. The husbandman prepares the soil, the inventor his models, the orator his address for which he receives two hundred dollars a night; the lawyer makes his brief for which he scarcely ever gets enough; the physician formulates his prescription; and so on through all the divisions of labor and industry. By these means man acquires a certain mastery and is furnished with inestimable results. So of the newspaper. It has grown within a century into the most popular vehicle for the spread of information. Its vigor and influence are felt in every household. Indeed, it may be called the peoples' storehouse of intelligence. It claims to be an institution, and even our statesmen, with great complacency, have denominated it the fourth estate. It does not come within the popular meaning of the term manufacture, unless, indeed, when its contents are slenderly endowed with the truth, or when its articles appear to be made out of whole cloth. It gives employment to printing presses and types and editors; and yet in the whole history of newspapers from the close of the seventeenth century this word manufac-

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turer has never been applied to them, or appropriated by them, in the whole range of English literature. No author has ever so used it, and it is never so applied by any statute or by any authority, except by way of opinion in the solitary case from Utah.

All the judges who heard the case are of opinion that the alleged bankrupt corporation is not a manufacturer within the meaning of the Bankrupt Act, and not amenable to bankrupt proceedings, except the Chief Justice. We are unanimous in holding that the petition is defective in form, for the reason that it does not allege that the promissory notes therein mentioned were the commercial paper of the alleged bankrupt, made or passed in its alleged business of a manufacturer. This, however, may be the subject of amendment, and for that purpose we sustain the demurrer, with leave to the petitioner to amend as he may be advised, and should he desire to take the case further. We have, however, decided the question that the corporation is not liable to be adjudged a bankrupt. So that after the formal corrections are made, there will be no necessity for a rehearing of the case, and the final judgment of the court will be to sustain the demurrer and dismiss the petition.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

AUGUST 15, 1878.

Objections to the vote of a creditor upon a resolution of composition, on the ground that his claim is fictitious or invalid, should be made at the first meeting and before the vote is taken; or if the facts impeaching its validity are afterwards discovered, application should be promptly made for relief; such objections cannot be raised for the first time upon a motion for confirmation.

The composition was for twenty-five per cent., payable five cents cash in five days after confirmation, and ten cents at the end of three and six months each from the same date. The resolution provided that upon payment of the five cents the property should revert to the debtor. It appeared that the bankrupts had, with a full knowledge of the wrongful nature of their act, used moneys belonging to a creditor, without his consent, which they had deposited in bank in their own name as a special deposit for him. *Held*, That the arrangement was not judicious nor reasonably safe for

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the creditors. A person proved once to have misappropriated the funds of another, fully understanding the wrongful character of the act, is unfit to be trustee of property for the benefit of his creditors.

In re EMILY BLOCH and MORRIS BLOCH.

THE facts appear fully in the opinion.

Morris S. Wise, for motion.

J. A. Seixas, contra.

CHOATE, J.—This is a motion to confirm a composition.

The composition is twenty-five cents on the dollar, payable five cents cash in five days after the composition is confirmed, and ten cents at the end of three and six months each from the same date, to be secured by the promissory notes of the debtors.

It also provides that the property shall revert to the debtors on payment of the instalment of five cents.

The composition was accepted by a vote of fifteen creditors, representing sixteen thousand six hundred and sixty-three dollars and thirty-six cents, against three creditors, representing two thousand eight hundred and forty-two dollars and thirty-nine cents. One of the assenting creditors, Henry Nathan, is a brother of one of the debtors, Emily Bloch, and he proved for six thousand three hundred dollars. Morris Bloch is a son of Emily Bloch, and the business of the firm was that of retail dealers in cigars and tobacco, etc.

1. Objection is taken to the note of Nathan being counted in making the majority necessary for the acceptance of the composition. It is insisted that upon the evidence this is a fictitious claim, or at least that it is of very doubtful validity. This objection comes too late.

It has been before held that such objections should be made at the first meeting and before the vote is taken, and if necessary, and the result of the vote will be affected by the determination of disputed debts, the meeting should be kept open till their re-examination. Or if the facts impeaching a debt that has been proved are afterwards discovered, application should be promptly made for relief.

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It must therefore, at this stage of the case, be assumed, for the purpose of this motion, that the debts proved were valid debts.

2. It does not appear that the amount proposed to be paid is unfair, nor that there is a reasonable expectation, that upon winding up the estate in bankruptcy, it will yield to the creditors more than twenty-five cents on the dollar.

3. It is objected that the composition above five cents on the dollar is not secured; that the character of the debtors is shown to be such that they cannot safely be trusted with their property, and that the creditors have no assurance whatever that they will be paid, nor that the property will be applied for that purpose by the debtors.

This objection is sustained.

The arrangement is not judicious nor reasonably safe for creditors. The largest claim against the estate, that of Nathan, above referred to, grew out of the use by the firm of moneys belonging to Nathan, deposited in bank by the firm in their name as a special deposit for him. It was used by the firm without his consent, and with a full knowledge of the wrongful nature of the misappropriation. All this is confessed by the debtors.

In the case of *Wilson & Greig* (18 N. B. R., 300) the question that arises here has been fully considered, and it was held that the personal and business character of the debtor is the chief element to be considered in passing on the objection that the composition, being without security for the notes to be given, leaves the property in the possession of the debtors.

A person proved once to have misappropriated the funds of another, fully understanding the wrongful character of the act, is unfit to be trustee of property for the benefit of his creditors, which is virtually what this composition makes the debtors.

Motion denied, with leave to the debtors, within five days, to file an amended proposition, with security for the notes, in which case the meeting may be re-opened for further action of the creditors, or the motion may be renewed.

In re Keller et al.

UNITED STATES DISTRICT COURT—N. D. NEW YORK.

OCTOBER 28, 1878.

At a composition meeting only those creditors who prove their claims are competent to engage in or take part in its proceedings.

At the second meeting in composition either party may furnish competent testimony, oral or written, on the question whether the composition is for the best interest of all concerned.

It is competent to produce any creditor and prove by him that he has been induced or biased to sign the resolution by any false statement, or by any evil practice of the debtor.

If a claim is disputed on its merits, the register who presides at a composition meeting may examine and pass upon it subject to review by the court. His power is not limited to the postponement of the claim, as in the case of a general meeting of creditors to elect an assignee.

In re JACOB KELLER and ALLAN J. GOODHUE.

De L. Crittenden and M. W. Cooke, for creditors.

CERTIFICATE OF REGISTER.

At the first meeting on composition, the examination of these alleged bankrupts was commenced, and, without completing it, my report was made; and it was agreed that the examination be completed at this second meeting on composition, and be returned to the court with my report of this meeting. At both meetings the resolution accepting the proposed composition is signed by creditors, and by others who appear by counsel it is opposed, or investigated with a view to future opposition, if deemed expedient, after a full hearing.

Questions have arisen which, for greater certainty, and in view of contingent expense, are desired to be certified to the court or judge.

First. Can creditors who do not prove their claims in the bankruptcy proceedings appear and examine the debtors, and produce other testimony, if other testimony can be allowed, and take part in the proceedings of this meeting or any meeting on composition?

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I decide that at a composition meeting, only those creditors who prove their claims are competent to engage or take part in its proceedings.

I fully appreciate the reasoning of Judge Hall, in *Re Sheppard* (1 N. B. R., 439), which was a case before me as register.

In that case the creditor who opposed the debtor's discharge, as between him and the debtor, had an unquestioned claim. So, in composition, any creditor named in the schedules can receive his share without proving his claim, because the debtor admits it, and is to pay it. But the hearing on composition goes farther. It affects the rights of creditors *inter se*. The proof of a debt is in the nature of a bill of interpleader, in which the claimant is *quasi* the complainant, and all other creditors are *quasi* defendants. If creditors who do not prove debts have the same right of examination as those who do, the latter may in this way be placed at the mercy of the debtors; because if they examine for one purpose, they may do so for all purposes. Creditors proving debts have no means of knowing that persons who take part and make expense and delay, or do other acts without proving claims, are in fact creditors, except on report of the debtors. They may or may not be creditors as between themselves and the creditors who do prove their claims. They may be fully secured, and the creditors proving may be ignorant of it. (*In re Trafton*, 14 N. B. R., 507; *Bump on Composition*, page 8, and cases cited; *In re Holmes*, 12 N. B. R., 86; *In re Mathers*, 17 Id., 225.) Such persons have no standing in court, except as against the debtors. It should be stated that this is an involuntary proceeding against these alleged bankrupts; and the persons claiming to be creditors who have not proved their claims, and desire to be heard, are not the petitioning creditors, or any or either of them.

Second.—The next question I certify is this:

Creditors having a right to be heard and take part at this meeting propose to make proof of matters in opposition to said confirmation by testimony other than the examination of the debtors; that is to say, they propose to introduce affirmative

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testimony to show, if they can, that it is not for the best interest of the creditors and all concerned to confirm said resolution.

I decide and hold they are entitled to do so.

By the terms of the act, the court on notice to the creditors, and upon hearing, shall inquire, among other things, if it is for the best interest of all concerned to confirm the resolution and make it operative.

By the terms of the order of reference, the register is to inquire into these matters "upon hearing"; in a word, this is the "hearing" referred to in and by the act, and is heard before the register by the order of the court, and by O. 36. The register is required to state in his report of the second meeting whether in his opinion it is for the best interest of all concerned to record the resolution.

I regard the "hearing" mentioned to be such a hearing by testimony as will disclose the facts bearing on the question as to the best interest of all concerned. I have no means of pronouncing an intelligent opinion without such testimony, if it be offered.

I therefore decide that either party may furnish on this hearing competent testimony, oral or written, on this vital question.

It is held that the books of the debtors may be examined by an expert. (12 N. B. R., 86 (90, 91); 13 Id., 568. See also Bump on Composition, 7, 8, and 13; *In re* Scott et al., 15 N. B. R., 73 (85), etc.; *In re* Weber Furniture Co., 13 Id., 529, 559; *In re* Lissberger, 18 Id., 230.)

I can hardly aid the court by multiplying authorities.

Third.—Is it competent to produce any creditor and prove by him that he has been induced or biassed to sign the resolution by any false statement, or by any evil practice of the debtors or either of them?

I decide and hold that it is.

The Bankrupt Act contemplates honesty and fair dealing, and equality among creditors, as among its most important features. (Bump on Composition, 13, 14; 13 N. B. R., 529, 559,

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supra. By analogy, *In re Baker*, 14 Id., 433; *In re Keiler*, 18 Id., 36; *In re Wronkow et al.*, Id., 81.)

The aid of the court can never be successfully invoked deliberately to sanction or confirm a fraud by judicial determination that it is for the best interest of anybody.

I make no suggestion, however remote, that there is or has been any fraud in this case.

I am passing on the competency of proof, and stating a general principle.

Fourth.—If a claim be disputed on its merits, may the register, who presides at a composition meeting, examine and pass upon it?

I hold and decide that he may, subject to review by the court.

This follows from the fact that the register is hearing the case as the court, except for review of final action.

At a general meeting of creditors to elect an assignee, the power of the register over a disputed claim is limited by the act to the postponement of a claim he deems defective, or which should be investigated by the assignee.

No power is conferred on him in case he holds it valid; and in that case it must be certified to the court as a matter in which there is an opposing interest.

There is no such limitation of his power at a composition meeting by the act, or by G. O. 36. (See cases *supra*, and *Bump on Composition*, 4, and cases cited. *In re Spencer*, 18 N. B. R., 199; *In re Tift*, Id., 227; *In re Lissberger*, Id., 230.)

All which is respectfully submitted.

ROCHESTER, N. Y., October 26, A.D. 1878.

J. D. HUSBANDS,
Register in Bankruptcy.

WALLACE, J.—I approve and confirm each of the rulings and decisions of the register upon the questions stated in the foregoing certificate.

In re Hale.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

OCTOBER 10, 1878.

The bankrupt was adjudicated upon his own petition. He remained in possession of his assets and disposed of a portion of them, and expressed an intention of going to Europe for the purpose of adjusting his foreign accounts, which constituted a considerable portion of his assets. He had expressed an intention of offering a composition, but had presented no application therefor to the court, and declared that his affairs were so confused, especially his foreign accounts, that he was unable to do so. *Held*, That the case was a proper one for a provisional warrant. The bankrupt law does not authorize the arrest of the bankrupt in a voluntary proceeding.

In re JOHN M. HALE.

THE facts appear fully in the opinion.

Edward T. Bartlett, for petitioner.

A. Blumenstiel, for bankrupt.

CHOATE, J.—This is an application for a provisional warrant and for a warrant to arrest the bankrupt upon the petition of one of his principal creditors.

The bankrupt was adjudicated August 27, 1878, on his own petition.

The warrant as first issued fixed October 10th as the time for the first meeting of creditors. The time was afterwards altered by procurement of the bankrupt's attorney to the 6th of November.

The bankrupt is still in possession of his assets, and since the filing of the petition he has disposed of some part of his goods in store, amounting to between three hundred and four hundred dollars. He has expressed an intention of offering a composition, but has not presented any application therefor to the court.

He has also expressed an intention of going to Europe for the purpose of adjusting his accounts with his foreign debtors, which constitute a considerable part of his assets. He declares his inability at present to make a proposition for a composition

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because his affairs, especially these foreign accounts, are so confused, and their availability for the purpose of a composition is so uncertain.

1. As to the provisional warrant, I think the creditor is entitled to have it issue upon the facts of this case, unless he shall accept in lieu thereof an order for the joint custody of the assets by the bankrupt and a custodian named by the petitioners, and for a full inventory to be filed with the clerk, and for the deposit of all moneys in bank subject to the order of the court. To this the bankrupt makes no objection if the case is held to be a proper one for a warrant, and this arrangement affords a practical security to the creditors without the expenses incident to the issue of a provisional warrant.

The violation by the bankrupt of the injunction against disposing of his property, though apparently no fraud was intended, and the delay in the holding of the first meeting and the indefinite postponement of the proposed application for a composition, render it a proper case for taking from the bankrupt the exclusive custody of his assets.

2. The motion for a warrant of arrest must be denied, on the ground that the bankrupt law does not authorize the arrest of the bankrupt in a case of voluntary bankruptcy, and the holding of him in custody or under bail during the pending of the bankruptcy proceedings. The only power to arrest the bankrupt expressly conferred upon the court by the statute is that given in Section 5024, which, in certain cases, authorizes the arrest of the alleged bankrupt in an involuntary case, and the holding of him in custody or under bail until the decision of the court upon the petition of the creditors, that is until the adjudication or dismissal of the petition, or until the further order of the court. It is at least very doubtful whether, under this section, the power of arrest in an involuntary case extends at all beyond the adjudication, the words "or until its further order" having been held in one case to mean only until such time before the adjudication as the court shall by its further order direct. (*Usher v. Pease*, 12 N. B. R., 305.)

The power to arrest, therefore, in any other case, if it exist,

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must be implied from some other grant of power contained in the statute, or must be implied because it is essential to the proper exercise by the court of the powers granted. Such a power has been strenuously contended for by the learned counsel for the petitioner, but upon a view of all the provisions of the bankrupt law having any bearing on the question, I am satisfied that it was not intended to invest the court with this power. It is obvious that if the power exists at all, it is practically a power to hold the bankrupt in custody or under bail during the entire period that the case in bankruptcy may be pending, which may be for several years, upon proof to the satisfaction of the court that he intends to leave the jurisdiction. It can hardly be doubted that so great a power, practically reviving imprisonment for debt, and touching so seriously the personal liberty of a very large class of citizens, would, if intended to be given, have been given expressly and not left to be inferred merely from the grant of other powers, and that, if given, its exercise would have been carefully limited by the act, to prevent hardship and abuse. The express grant of the power in one case shows that the attention of the framers of the law was called to the subject, and they are silent as to all other cases. This raises a presumption of some strength against the existence of the power in other cases. Moreover, in the case of involuntary bankruptcy before adjudication, there are reasons for this remedial process which do not apply after adjudication or in a voluntary case. An involuntary proceeding is one hostile to the debtor and presumably against his will, and based upon prima facie proof of an act of bankruptcy injurious to or a fraud upon his creditors, and until the return of the order to show cause, and the action of the court thereon, the estate of the bankrupt is not so entirely within the control of the court as it is after an adjudication, or as it is at all times in a voluntary case, in which, in the petition itself, the bankrupt submits his property to the jurisdiction and disposition of the court for the purposes of the act. Nor is the bankrupt himself, before adjudication in an involuntary case, to the same degree subject to the orders of the court, or within its power

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to punish for contempt, as a party to a proceeding before it, as he is in voluntary cases after the filing of the petition. For these reasons it may well have been thought necessary in proper cases where, by evading the jurisdiction, he might defeat the purpose of the act to bring his property within the control of the court, to give a limited power until the hearing and decision upon the petition to hold him in custody to secure his appearance. But, after adjudication and at all times in voluntary cases, the act provides other means of coercing the debtor to do what is required of him under the act. Section 5104 provides that he shall be subject to the orders of the court. He is liable at any time to be put under examination by any creditor, and the power is expressly given to punish any refusal or neglect to obey the orders of the court as for a contempt. Thus it will be seen that the creditors are not remediless.

These are substantial powers of coercion, and in addition to this the bankrupt's right to his discharge will be forfeited if he absconds or fails in any respect to fulfill on his part all the requirements of the act. Although cases may be imagined where there may be a failure of justice and a defeat of the purposes of the act, through the absconding of the debtor, yet it may well have been thought that these coercive powers were sufficient for the general enforcement of the act. At any rate, these provisions seem to me to relieve the case from the argument that the power of arrest is essential to the proper exercise by the court of the powers granted by the act. Further support to this conclusion is, I think, to be drawn from General Order No. 13, which regulates provisional remedies in voluntary cases, and which provides for the issue of a provisional warrant to seize the property in a voluntary case, but makes no provision for a warrant of arrest in a voluntary case.

The act expressly authorizes a provisional warrant only in case of involuntary bankruptcy; but by this general order the Supreme Court has indicated its opinion that the issue of a provisional warrant, in a voluntary case where the property is in peril, is authorized by implication by the other provisions of

In re Hopkins v. Carpenter et al.

the act, and such implication may be fairly drawn from the fact that by the petition the property of the bankrupt is voluntarily subjected to the disposition of the court for the purposes of the act. And the fact that no provision has been made in this or any other general order, for a warrant of arrest in any other case than that expressly provided for in the act, indicates the opinion of the Supreme Court that no such remedy is available.

For these reasons the motion for a warrant of arrest is denied, without a critical examination of the circumstances which are claimed to make an arrest proper in this case.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

AUGUST 30, 1878.

Where the want of jurisdiction appears on the petition, the consent of the parties cannot give jurisdiction, and the court of its own motion should take notice of the point.

From the schedules annexed to a petition filed by one partner of a dissolved firm against his copartners for the adjudication of the firm, it appeared that the firm had been dissolved by judicial decree and all its assets transferred to a receiver, and that there were firm debts. *Held*, That the firm could not be adjudicated.

In re SIDNEY W. HOPKINS on his own behalf and against ROBERT J. CARPENTER and FRANK H. COLLINS.

THE facts appear fully in the opinion.

A. Blumenstiel, for petitioner.

W. B. Hornblower, contra.

CHOATE, J.—This is a petition under Section 5121, brought by one partner of a dissolved firm against his two co-partners.

The petition shows that neither Carpenter nor Collins resides in this district, that the firm was formed in 1868, and thereupon commenced to carry on its business in this district. The petition was filed July 30, 1878.

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The schedules annexed show that the firm was dissolved by judicial decree and all its assets transferred to a receiver, April 30, 1878, and that there are firm debts still unpaid.

On the return day the two respondents, Carpenter and Collins, appeared and consented to an adjudication. A creditor of the petitioner asks leave to intervene and moves to dismiss the petition for want of jurisdiction. It was held by Judge Blatchford, in *Re Crockett* (2 N. B. R., 208, 2 Ben., 514), and in *Re Hartough* (3 N. B. R., 422), that a firm not subsisting at the date of the filing of the petition cannot be adjudicated bankrupt if there are no firm assets, though there may be firm debts still unpaid. Although in some other districts the opinion has been expressed by the court that it is enough if there are outstanding debts, yet these cases have never been overruled and are conclusive in this court. The present case is directly within them. The entire want of assets and the dissolution of the firm appear by the schedules which are a part of the petition. It is said that the creditor intervening has no right to appear and that the respondents do not take the objection, but the question being one of jurisdiction, and the want of jurisdiction appearing on the petition, the consent of the parties cannot give jurisdiction and the court of its own motion should take notice of the point.

Petition dismissed as to Carpenter and Collins and adjudication as to Hopkins.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1877.

One S., who was a special partner in a firm whose nominal assets exceeded the liabilities by only two-ninths, made a settlement upon his wife of leasehold property and bonds to the amount of one hundred thousand dollars. About this time the firm was dissolved, and S. and one of the members of the old firm formed a new copartnership, furnishing no new capital, and continuing the business as if the old firm still subsisted. Two years later the new firm failed, and was found to be hopelessly insolvent. It did not appear that the wife took any part in bringing about the settlement, or that there was any guilty knowledge on her part in the transaction. She died before the failure, and by her will gave the

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income of her estate to her husband for life, with remainder to his children, she having none. Her executor sold the leasehold property to one P., who paid therefor partly in cash and partly by mortgage. The cash was loaned by the executor to a firm which afterward failed, and was thereby lost to the estate. In an action by the assignee of the firm to reach the property settled upon the wife, and to subject it to his administration, *Held*, that the settlement was invalid; that the assignee was entitled to possession of the mortgage, but that there could be no money judgment against the estate for the balance of the proceeds of sale of the leasehold property.

The UNITED STATES TRUST COMPANY, Executor and Trustee, &c., of MARY ANN SPARKMAN v. JOHN SEDGEWICK, Special Receiver, &c., of J. K. PLACE & CO.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The facts appear fully in the opinion.

SWAYNE, J.—Prior to the 1st of December, 1865, a copartnership existed in the city of New York under the name of J. K. & E. B. Place. They were dealers in groceries. The members of the firm were James K. Place, Ephraim B. Place, and James D. Sparkman. The latter was a special partner. Under the law of New York, such partners can put a limited sum at risk, and are only liable for that. At the time mentioned this copartnership was dissolved. E. B. Place retired, and a new firm was formed under the name of J. K. Place & Co. The members were James D. Sparkman and James K. Place. By the terms of the agreement, Sparkman was to contribute capital to the amount of two hundred thousand dollars, and Place to the amount of six hundred thousand dollars, and the profits were to be apportioned accordingly. After making due allowance for the payment of all liabilities, the estimated value of Sparkman's interest in the assets of the old firm was two hundred and sixty-two thousand dollars, of James K. Place's two hundred and twenty-seven thousand dollars, and of E. B. Place's one hundred and sixty-eight thousand dollars. The latter sum E. B. Place had a right to draw out at any time, and he subsequently received the most of it. The debts

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of the old firm at the time of the creation of the new one, exclusive of the sum due E. B. Place, were three million eight hundred and fifty thousand dollars. Adding what was to be paid to him, they exceeded four millions of dollars. A part of the assets of the old firm was merchandise on hand valued in gold at nine hundred and ninety-six thousand dollars. To this was added, to show its value in currency, forty-eight per cent., making an aggregate of one million four hundred and seventy-four thousand dollars. There was also cash on hand, consisting of balances in the banks with which the firm dealt, to the amount of one hundred and thirty-seven thousand dollars. The other assets were chiefly bills receivable and accounts in favor of the firm. J. K. Place & Co. put no new capital into their concern. They bought the merchandise of the former firm at one million four hundred and seventy-four thousand dollars, the amount at which it was estimated in currency. This was nearly a million of dollars in excess of the aggregate of the sum to which they severally claimed to be entitled out of the assets of that firm. They remained at its place of business, used its books, and applied its means in all respects as if that firm still subsisted.

By a deed bearing date on the 30th of November, 1865, James D. Sparkman assigned the leasehold premises here in question to James K. Place. By a like deed dated on the 1st of December following, Place assigned the same premises to Mary A. Sparkman, the wife of James D. Sparkman. Both these deeds were acknowledged on the fifth and recorded on the ninth of the month last mentioned. The premises were the family residence of Sparkman. At the time of this transaction he settled upon his wife also the horses, carriages, and furniture which formed a part of the establishment. He likewise directed his counsel to prepare the proper instrument for settling upon his wife forty thousand dollars of seven per cent. bonds of the United States which he had received as his proportion of a larger amount of those securities belonging to the old firm. He afterward claimed that this settlement had been made. In one of his answers to the bill in this case he said:

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"That being about to embark as a general partner in the said firm of James K. Place & Co., and being well advanced in years, he was desirous of making in favor of his wife, Mary A. Sparkman, since deceased, a settlement of a portion of his property; and on or about the first day of December, 1865, having paid in his proportion of the capital to be contributed by him to the firm of James K. Place & Co., he directed his counsel to take the proper steps to secure to his said wife, from his then existing remaining property, the sum of one hundred thousand dollars (\$100,000) or thereabouts."

What was done touching the property mentioned was the intended realization of this plan. It is not questioned that the several items were worth the amount proposed to be settled. Mary Ann Sparkman died on the 13th of October, 1866. By her will, which bore date on the 20th of July of that year, she gave the income of her estate to her husband, James D. Sparkman, for life, and after his death, the estate to his children. She had none herself.

After her death the leasehold premises were sold and conveyed by her executor to John Q. Preble. He paid eighteen thousand one hundred and ninety-six dollars and sixty cents in cash, and gave his bond and mortgage for forty thousand dollars, being the balance of the purchase money.

On the 27th of December, 1867, J. K. Place & Co. failed, and made an assignment to Burrit and Sheffield for the benefit of their creditors. Subsequently, both the partners, Place and Sparkman, went into voluntary bankruptcy, and Sedgewick, the complainant, became their assignee under the bankrupt law. He filed this bill in the District Court to reach the forty thousand dollars of government bonds and the proceeds of the leasehold premises, and to subject them to his administration. That court decreed in his favor with respect to the bonds, but dismissed the bill as to the real estate. He thereupon appealed to the Circuit Court. There the decree of the District Court was affirmed as to the bonds, and reversed as to the realty. The court decreed, among other things, that the bond and mortgage of Preble should be delivered to the complainant;

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that the amount due upon them should be paid to him; and that the executor of Mary Ann Sparkman should pay to the complainant, out of the assets of her estate, the sum of twenty-eight thousand three hundred and four dollars and eighty-nine cents.

This amount was made up of the cash received by James D. Sparkman, while executor, from Preble, with interest to the date of the decree, and interest paid to the executor by Preble on his bond and mortgage, with interest upon that also to the same period.

The executor thereupon removed the case to this court by appeal.

The appeal was limited to the leasehold premises and the money decree against the executor. None was taken with respect to the bonds of the United States. That subject is not, therefore, involved in the controversy as it is now before us.

Two questions are presented for our determination:

1. Was the settlement of the leasehold property valid?
2. If not, was the money decree against the executor properly rendered?

On the first point we entertain no doubt. The debts of the old firm, as we have shown, were three million eight hundred and fifty-two thousand and nine hundred dollars. The assets, as they appeared on the books, were four million five hundred and nine thousand dollars. The debts were a sum certain which grew constantly and largely by the accumulation of interest. How much less than their face the assets were worth does not appear. They were liable to constant depreciation from the failure and insolvency of those from whom they were due. A sudden fall of prices would have produced the same effect as to the merchandise. The cash on hand was less than three per cent. of the amount of the liabilities to be paid. The assets of every kind, good and bad, exceeded the amount of the liabilities to be paid by only two-ninths. He would have been a bold, if not a rash man, who would have agreed to take all the assets and pay all the debts. No responsible person, we apprehend, would have entered into such a stipula-

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tion without a large premium in addition to the assets. The new company was embarrassed from the beginning, and failed within a few days over two years from the time it was formed. It was found to be hopelessly insolvent. Its liabilities exceeded its means by at least six hundred thousand dollars.

With these facts before us we cannot hesitate to hold that Sparkman was in no condition to settle anything on his wife when the new partnership was formed.

The turning-point in this class of cases is always whether there was fraud in fact. The result depends upon the solution of that question. When one engaged or about to engage in any business has the means to meet its usual exigencies, and devotes such means in good faith to the business, and has besides other means which he chooses to settle upon any object of his bounty, unlooked for disasters on his part subsequently occurring will not affect the validity of the settlement, because they afford no ground for the imputation of unfairness. But where there are heavy subsisting liabilities, doubtful solvency, a large settlement made upon the wife at the outset of the business, and failure and insolvency to a large amount shortly follow, it is impossible to avoid the conviction that there was a deliberate plan to provide for the settler and his family in any event, and to throw the burden of the losses that might occur upon his creditors. The intention animating such conduct is condemned alike by ethics and the law. We think the case before us falls within this category, and we are entirely satisfied with the judgment of the Circuit Court upon the subject.

But different considerations apply to the fund for which the money part of the decree was rendered. The moneys were received by the executor for property sold by him after the death of the testatrix. It was lent by him to the firm of Place, King & Place, and was lost to the estate by their failure. There is no proof that the testatrix took any part in bringing about the settlement, or that there was any guilty knowledge on her part in the transaction. It is fairly to be presumed that she confided in the good faith of her husband, and simply yielded obedience to his wishes. The provision of her will at-

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tests her devotion to him. The fund did not exist in her lifetime, and her estate has been in no wise benefited by it. The transfer of the property was his act, not hers. She was only a passive recipient. Her will, doubtless influenced, if not controlled by him, gave him her entire estate for life, and after his death, gave it to his family. No provision was made for her family.

The sphere of the avocations and duties of husband and wife are different. Usually, she knows little of business or property interests. It is natural that she should confide in his integrity, and be guided in everything by his kindly judgment. She is always *sub potestate viri*. Hence, the disabilities and safeguards which the law wisely throws around her.

Chancellor Kent says: "The husband is liable for the torts and frauds of the wife committed during coverture. If committed in his company, or by his order, he alone is liable." (2 Com., 149.) "And if a wife act in company with her husband in the commission of a felony, other than treason or homicide, it is conclusively presumed that she acted under his coercion, and is consequently without any guilty intent." (1 Greenleaf's Ev., Sec. 28. See, also, *Liverpool Adelphi Loan Association v. Fairhirst*, 9, Exch., 422, and *Carleton v. Haywood*, 49 N. H., 314.)

A *feme covert* may be a trustee, but her husband is personally liable for any breach of trust she may commit, and, hence, she cannot act in the administration of the trust without his concurrence or consent. (Hill on Trustees, 464; *Carrol v. Connet*, 2 J. J. Marsh., 195.) She is not liable upon the covenants of title in a deed executed by herself and her husband. (Schouler's Dom. Rel., 155.) Upon the subject of her disabilities, see *Norton v. Meader*, (4 Sawy., 603.)

This part of the decree was clearly erroneous, and the error must be corrected.

The cases of *Phipps and others v. Sedgewick, assignee, and others*, and of *Place and others v. Sedgewick, assignee, and others* (16 N. B. R., 64), were branches of this litigation. They presented the same questions of fact and law which we have

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considered in this case. Those questions were disposed of as we have now determined them. The fulness with which the views of the court, speaking through Mr. Justice Miller, were expressed, renders it unnecessary to add anything to what has been already said on the present occasion.

This case will be remanded to the Circuit Court with directions to modify the decree in conformity to this opinion.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

SEPTEMBER 19, 1878.

In 1868, a suit was commenced by one T. against C. and others for the joint benefit of the bankrupt and one W., who had agreed to share in the results of the litigation and bear its expenses in equal proportions. A judgment was recovered in favor of T., from which an appeal was taken about the time the proceedings in bankruptcy were commenced. The assignee in bankruptcy was substituted in place of the bankrupt, who was a defendant in the suit, and contributed to the payment of counsel fees and expenses until he gave notice that he would pay no more expenses. Afterwards, under an order of the Court, the assignee was permitted to withdraw and assign all his interest in the litigation to W. The judgment was reversed by the General Term and a new trial ordered, and the Court of Appeals affirmed the judgment of the General Term. The counsel having, after the termination of the suit, presented a claim against the assignee for their services before as well as after his substitution, *Held*, that they were only entitled to payment for their services and disbursements after the assignee stipulated to be substituted, and that W., by taking the assignment of the assignee's interest, assumed all its burdens, and has no equity to demand reimbursement from the assignee.

In re ELISHA C. LITCHFIELD.

THE facts appear fully in the opinion.

W. S. Palmer and *Jos. P. Whittemore*, for petitioners.

W. Howard Wait, for assignee.

CHOATE, J.—This is a motion to confirm the report of the register in the matter of a claim against the estate of the bankrupt for the services and disbursements of counsel and attorneys, rendered and incurred in a litigation carried on by

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the bankrupt before his bankruptcy, and afterwards by the assignee, who was substituted as a party in his place.

The suit was commenced in 1868 by one Ten Eyck against one Craig and others; but it was in fact carried on for the joint benefit of the bankrupt and one Whittemore, under an agreement between the bankrupt and Whittemore that they should share in the results of the litigation and bear its expenses in equal proportions.

The counsel who now make this claim were retained with knowledge of this agreement. Prior to the commencement of the bankruptcy proceedings a judgment was recovered favorable to the bankrupt and Whittemore. From the judgment thus obtained an appeal was taken to the General Term of the Supreme Court of New York, in which the action was pending, and about the same time, October, 1873, these proceedings in bankruptcy were commenced by creditors' petition.

Pending the appeal, the assignee in bankruptcy was, by order of the court and on his own application, substituted as a party in place of the bankrupt, who was a party defendant in the suit. From that time, until he gave notice that he would pay no more expenses, the assignee contributed to the payment of counsel fees and expenses as called for by counsel, and afterwards, under an order of this court, the assignee was permitted to withdraw from the litigation and assign all his interest in the subject of it to Whittemore. The General Term reversed the judgment, and ordered a new trial, and on appeal to the Court of Appeals the judgment of the General Term was affirmed, and the result of the litigation is, that Whittemore recovers nothing, and is liable for one thousand and forty-two dollars—costs.

After the termination of the suit, the counsel presented their claim against the assignee, asking to be paid their charges for services and disbursements prior to the substitution of the assignee as a party to the litigation, as well as those subsequent to that date.

The matter was referred to the register, who has disallowed the claim, except as to services rendered and disbursements in-

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curred after the assignee stipulated to be substituted as a party to the suit, and the question is as to the correctness of this ruling.

It is insisted that the assignee by electing to carry on the litigation, and by becoming a party to it, took the place of the bankrupt, and thereby became entitled to all the resulting benefits and charged with all the burdens with which his predecessor was charged, and that he became a partner with Whittemore in the adventure, and liable, as between himself and Whittemore, for all the existing obligations, which under the agreement between him and the bankrupt, were then chargeable upon the bankrupt. It is also insisted that the claim of counsel for services in a suit is a single and indivisible claim not apportionable, unless by agreement or special circumstances among several persons who successively and by assignment or substitution sustain the relation of clients to the counsel, and therefore that the new client becomes at once and necessarily charged with all the obligations to the counsel which rested upon predecessor at the time of substitution. I have examined carefully the briefs of counsel and the cases cited in support of this claim, and do not think they sustain the position taken.

This is not a question whether attorneys have a lien on the proceeds of litigation for their services and disbursements at all stages of the suit, whatever may have been the changes of the parties. Many of the cases cited are cases as to the liability of a new or substituted party to costs accrued during all stages of the suit as between party and party. I do not see that these cases have any analogy to the present. Costs must be chargeable against a *party*, and the party at the time the judgment for costs is recovered is necessarily chargeable with them, if anybody is.

There is no reason why the party recovering costs should lose them because the other party has been changed by substitution. But the claim of counsel for compensation rests wholly in contract, express or implied, and is the like in its character as between party and party, the claim for costs.

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The liability to costs as between party and party is artificial and statutory, party punitive and party compensatory, and based on various reasons of public policy, and not on contract at all.

The claim of these petitioners must depend either on the principle that their claim for their entire service is indivisible, and therefore necessarily became chargeable against the assignee as an entirety on his substitution, thus releasing the bankrupt; or if the claim is in its nature divisible, the claim can only be sustained on an agreement, to be implied from the circumstances, that the assignee would assume and pay these prior expenses of the bankrupt. There was no express agreement of the assignee to pay them. The case chiefly relied on as establishing the rule contended for, that the entire charge for services of counsel in a litigation is a single and indivisible cause of action, is the case of *Harris v. Osbourn* (2 Cr. & M., Exch., 629), in which case it was held that an attorney's claim for his costs as against his client during the entire course of a suit constitute a single claim or cause of action, within the meaning of the Statute of Limitations, so that no part of it is barred if the last item is within the term within which an action lies.

That case and the cases on which it is based do not hold that such a claim for costs even is not, under any circumstances, unapportionable.

They recognize the right of the attorney to protect himself by giving notice that he will not proceed unless the necessary funds are provided, and in case of a failure in providing means, to terminate the relation and sue for his costs already accrued. It holds that for reasons based on the peculiar relation between client and attorney the attorney cannot sue before the end of the litigation without a prior demand and refusal or neglect to furnish funds.

The authority of that case need not be questioned. It relates only to liability to costs between attorney and client as regulated by statute and practice in England. And notwithstanding that authority, counsel may well be held to have a

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valid and complete claim for services rendered at the close of each well defined and distinct stage of a litigation, as in the present case at the termination of the suit by judgment in the Special Term, by the termination of the litigation in the General Term, and again in the Court of Appeals. It may well be doubted whether these are not to be regarded as three distinct suits, a question not touched by the authorities cited.

But, independently of this question, the cases cited are not sufficient to show that counsel may not maintain from time to time an action for services rendered in the cause, or at least may not, by their own act and at their election, after a demand, sever the unity of the service and claim payment for the services already rendered.

Such is believed to be the view of the rights of counsel as against their clients usually accepted and acted on without question by both parties in this country, and such seems to be a reasonable view of the relation between them, and one analogous to other cases of continuous services rendered.

It may well be that if nothing is done to sever the continuity of the service, the entire series of claims will constitute a single cause of action so far as the Statute of Limitations is concerned.

It is not necessary, however, to go so far as this in the present case, because claims that are single and unapportionable under ordinary circumstances are apportioned by the law when equity so requires, and bankruptcy is one of the events the intervention of which effects such an apportionment by act of the law. And it cannot be doubted that upon the bankruptcy of Litchfield, the counsel who had served him up to that time had the right to prove against his estate for their services and disbursements up to the time of the filing of the petition, and to receive, ratably, with other creditors, a dividend out of the estate. Such has been the constant practice in such cases, and, so far as I have observed, it has never been questioned.

The situation, then, of the counsel at the time of the bankruptcy and the appointment of the assignee was this: The counsel were creditors for the amount already earned and ex-

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pendent, with the same rights as other creditors. If the assignee elected to go on with the suit, which he could do or not, as he chose, and which the counsel could not in any way compel him to do, he would, of course, become liable to pay, like any other person, a reasonable compensation for all services rendered to him. He could also choose his own counsel, and change his attorney at will, subject to the necessity of discharging any lien on necessary papers in his attorney's hands.

No court has yet denied the general right of the snitor to change his attorney where there was no agreement other than that to be implied from a general retainer. What ground is there then for implying, from the mere fact that the assignee employs the same counsel to go on with the litigation, a promise on his part to pay in full out of the estate in his hands this prior claim, for which the counsel have before such new employment only a right to share in the estate as a creditor? If he had chosen to employ other counsel it could not be contended that they would be entitled to anything more than a *quantum meruit* for their services thereafter rendered. And I can see no principle of equity or ground of reason upon which, by reason of his employing the same counsel, they should become entitled to anything more. But it is still insisted that, even if the counsel cannot of their own right maintain this claim, Whittemore may maintain his right to have the assignee pay one-half of all these charges, on the ground that, under the agreement between Whittemore and the bankrupt, they were partners in the adventure, and that the assignee, by assuming the place of Litchfield, became, as it were, a purchaser of a partner's interest, and so liable to Whittemore to discharge one-half of all accrued charges, as that was the condition on which the bankrupt held an interest in the claim; that the assignee necessarily succeeded to the same interest, and held it on the same condition. If there is anything in this claim, it is rendered wholly nugatory by the fact that since the assignee thus succeeded to the position of the bankrupt he has, with the consent of Whittemore, re-

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assigned all his interest in the contract to Whittemore; and if the claim is well founded as to the effect of the assignment to the assignee, and thus assuming the position of the bankrupt under the contract, the like effect must follow the reassignment to Whittemore. In assuming all the benefits he has assumed all its burdens likewise, and therefore has now no equity to demand reimbursement from the assignee.

The point was correctly ruled by the register.

Report confirmed.

SUPREME JUDICIAL COURT—MASSACHUSETTS.

NOVEMBER 19, 1877.

Where, by the terms of the lease, the bankrupt is liable to pay rent at fixed and stated periods, the rent is, under Section 5071 of the U. S. Rev. Stats., to be regarded as growing due from day to day; the discharge releases the bankrupt from liability for the proportionate part up to the time of the bankruptcy, but does not affect his liability for the part growing due after that time.

ROBERT O. TREADWELL et al. v. JOHN MARDEN et al.

MORTON, J.—The Bankrupt Law provides that a discharge duly granted shall, with certain exceptions which do not apply in this case, “release the bankrupt from all debts, claims, liabilities, and demands, which were or might have been proved against his estate in bankruptcy.” (U. S. Rev. Stats., Sec. 5119.) It also provides that “where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods.” (Sec. 5071.)

This action is brought to recover a month’s rent under a lease, a part of which, if the rent is to be regarded as growing due from day to day, accrued before the bankruptcy of the defendants, and a part afterwards. For the proportionate part

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up to the time of the bankruptcy, the plaintiffs are entitled to prove against the estate in bankruptcy. and the discharge is a release of that part. For the part growing due after the time of the bankruptcy, the plaintiffs are entitled to recover, as the discharge does not release it. (*Ex parte* Houghton, 1 Lowell, 554.)

It follows that the ruling of the Superior Court was erroneous. But as the plaintiffs, upon the admitted facts, are entitled to judgment for an ascertained part of their claim, there is no occasion for a new trial. If the plaintiffs will remit the proportionate part of their claim, which grew due before the bankruptcy of the defendants, the exceptions will be overruled, otherwise the exceptions must be sustained.

Order accordingly.

SUPREME JUDICIAL COURT—MAINE

OCTOBER 19, 1877.

The attachment referred to in Section 5044 of the U. S. Revised Statutes is an attachment on *mesne* process. The section does not relate to proceedings on final process. It does not dissolve a lien created by seizure of the debtor's property on execution issued to enforce the judgment of the court.

In an action brought by plaintiffs against one P. and defendant as his trustee, judgment was rendered by default, execution issued thereon, and the sheriff made due demand on defendant for the property of P. in his hands and subsequently returned the execution *nulla bona*. After such demand, but before the return of the execution, P. filed a voluntary petition in bankruptcy, and was subsequently adjudicated a bankrupt. In an action to enforce defendant's personal liability on account of his failure to turn over the property to the sheriff after such demand, *Held*, That the bankruptcy of the debtor did not dissolve the plaintiff's lien on the property of the debtor in the possession of defendant as his trustee.

HORACE P. STORER et al. v. JAMES H. HAYNES

LIBBEY, J.—This is *scire facias* against the defendant as trustee of Henry O. Perry. On the 18th of March, 1876, these plaintiffs commenced a suit against said Perry and the defendant as his trustee, returnable to the April Term of this court,

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Penobscot County. The writ was served on the trustee, March 19, 1876. The action was duly entered at said April Term, and judgment was rendered against the principal defendant and the trustee on default, May 16, 1876, and execution was duly issued on the judgment, May 19, 1876, and was put into the hands of a deputy sheriff for said county, who made due demand on the trustee, May 25, 1876. The execution remained in the hands of the officer during its life, and he made due return of the demand, and *nulla bona*. The first return of the officer was dated August 16, 1876, but at the trial he was permitted by the court, against the objection of the defendant, to amend his return by certifying that he kept the execution till the second day of September, 1876.

The only grounds of defence set up by the defendant were the objections to the officer's return, and that he was notified by Joseph B. Hutchinson, December 30, 1876, that he claimed the funds in his hands as assignee in bankruptcy of said Perry. Said Hutchinson asked leave to appear and claim the funds in the hands of the defendant, as assignee in bankruptcy of said Perry, and was permitted to do so. Perry filed his petition to be declared a bankrupt, in the office of the clerk of the District Court of the United States for the District of Maine, July 17, 1876; was duly adjudged a bankrupt, and on the 8th of November, 1876, said Hutchinson was appointed his assignee, and the estate of said Perry was duly conveyed to him by the register in bankruptcy.

Upon these facts the presiding judge rendered judgment against the defendant, and said claimant excepted. We think the rulings correct. The amendment of the officer's return was properly allowed. (*Woods v. Cooke*, 61 Me., 215.)

The principal ground relied upon by the claimant is that the proceedings in bankruptcy, having been commenced within four months from the service of the writ on the trustee, by virtue of the Revised Statutes of the United States, Section 5044, the attachment of the goods, effects, or credits of the bankrupt in the hands of the trustee, by the trustee process, was dissolved, and that the title thereto passed to him as assignee absolutely

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as of the 17th of July, 1876. The statute relied upon reads as follows :

“ As soon as an assignee is appointed and qualified, the judge, or when there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on *mesne* process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings.” The attachment referred to in this section is an attachment on *mesne* process. It is such an attachment made within four months that is dissolved by bankruptcy. It does not relate to proceedings on final process ; it does not dissolve a lien created by seizure of the property of the debtor on execution, issued to enforce the judgment of the court. (*Wilson v. City Bank*, 9 N. B. R., 97 ; 17 Wall., 473.) In that case judgment was rendered against the debtor in the State Court by default, execution issued, and on the same day the goods of the debtor were seized by an officer on the execution, and after the seizure, and before the sale, the debtor was adjudged a bankrupt, on petition of his creditors, filed after the seizure. The bankruptcy was within four months of the seizure. The officer afterwards sold the goods on the execution, and the court held that the proceeds of the sale belonged to the creditor, and not to the assignee of the bankrupt.

If at the time of the commencement of the proceedings in bankruptcy the plaintiff's lien on the goods, effects, or credits, in the hands of the trustee, existed by virtue of the attachment on *mesne* process only, then it was dissolved, and the property passed to the assignee.

But we think it did not exist by virtue of such attachment only. Judgment had been rendered charging the trustee.

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Execution had been issued against the goods, effects, or credits of the debtor, in the hands of the trustee. It had been put into the hands of an officer, and demand had been duly made on the trustee within thirty days next after the rendition of judgment, and before the commencement of the proceedings in bankruptcy. The execution remained in the hands of the officer during its life, and was duly returned. The judgment charging the trustee is a determination by the court that he had goods, effects, or credits of the debtor in his hands and possession, and that they were duly attached. If not demanded of the trustee by an officer, by virtue of an execution, within thirty days next after final judgment, the attachment of them on the original process is dissolved; if so demanded the attachment becomes absolute, and the creditor's lien is perfected. The demand by the officer, by virtue of the execution, is a seizure, on final process, of the goods, effects, or credits in the hands of the trustee. It is equivalent to a seizure by an officer, by virtue of an execution, of goods attached on the original writ, within thirty days from the rendition of judgment. If the execution remains in the hands of the officer during its life, so that he may receive the goods, effects, or credits, if delivered to him by the trustee, and apply them in satisfaction thereof, and is duly returned unsatisfied, the personal liability of the trustee becomes fixed, unless he can show some legal defence; but this personal liability results from his refusal to deliver the goods, effects, or credits in his hands to which the creditor's lien had become absolute by the demand by virtue of the execution.

The result is that the bankruptcy of the debtor, upon the facts of this case, did not dissolve the plaintiff's lien on the goods, effects, or credits of the debtor, in the hands and possession of the trustee.

Exceptions overruled.

APPLETON, Ch. J., DICKERSON, DANFORTH, VIRGIN, and PETERS, JJ., concurred.

Hersey v. Elliot.

SUPREME JUDICIAL COURT—MAINE.

JANUARY 8, 1878.

A bankrupt, the payee of a negotiable bill or note, who before bankruptcy sells and delivers the same without indorsement, may indorse the same after bankruptcy so that the holder may maintain an action thereon in his own name.

PHILO HERSEY v. CHARLES ELLIOT.

PETERS, J.—But a single point is presented by the facts of this case. Can a bankrupt, the payee of a negotiable bill or note, who before bankruptcy sells and delivers the same without indorsing it, indorse the note after bankruptcy, so that the holder may maintain an action thereon in his own name? It is well settled, on many authorities, that he can. (*Smith v. Pickering*, 1 Peake, N. P., 50; Anonymous, 1 Camp., 492, notes; *Lemprière v. Pasley*, 2 T. R., 485; *Ex parte Mowbray*, 1 Jac. & Wal., 428; *Watkins v. Maule*, 2 Jac. & Wal., 237; *Ex parte Greening*, 13 Vesey, 206; *Wallace v. Hardacre*, 1 Camp., 45; *Smoot v. Morehouse*, 8 Ala., N. S., 370; *Valentine v. Holloman*, 63 N. C., 475; 3 Par. Con., 470, 494, and notes.) The reasons given for the rule appear to be satisfactory and conclusive. The indorsement in such case is but a mere form. The property in the note passed by the sale. The bankrupt had no actual interest in it afterwards. At most, he was to be regarded as merely a trustee of the legal title for the benefit of the vendee. In general, only such right, title, and interest as the bankrupt himself has, in law and equity, in any estate or property, passes by bankruptcy to the assignee. That the assignee does not take a beneficial interest therein belonging to another person, is well settled in the cases cited, and many more. (*Sawtelle v. Rollins*, 23 Maine, 196; *Baker v. Vining*, 30 Maine, 121; *Smith v. Chandler*, 3 Gray, 392; *Nichols v. Bellows*, 22 Vt., 581; *Streeter v. Sumner*, 31 N. H., 542; *Mitchell v. Winslow*, 2 Story, 630; *Goss v. Coffin*, 17 N. B. R., 332, 66 Me., 432; Vide, 111 Mass., 532.)

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The principle contended for by the plaintiff has been applied in analogous cases. It is admitted in proceedings under State insolvent laws. (*Norcross v. Pease*, 5 Allen, 331; 3 Par. Con., 495, and notes.) A negotiable note, transferred by the payee before his death by delivery only, may be indorsed by his administrator with the same effect as if done by himself in his lifetime. (*Malbon v. Southard*, 36 Maine, 147.) And when a woman assigns, by delivery, a note payable to her order, and afterwards marries the maker, her indorsement of the note after such marriage transfers the legal title. (*Guptill v. Horne*, 63 Maine, 405.) The case relied on by the defendant (100 Mass., 18), does not sustain an adverse position to the other cases cited. That case only maintains that, if a note is not indorsed at the time it is sold, a subsequent indorsement will only carry such legal and actual title to the note as the indorser had when he sold the same. If he had indorsed it earlier, the indorsement might have transferred, by the operation of the principle of estoppel applying to negotiable paper, more than such title and right.

Defendant defaulted.

APPLETON, Ch. J.; DICKERSON, DANFORTH, VIRGIN, and LIBBEY, JJ., concurred.

SUPREME JUDICIAL COURT—MASSACHUSETTS.

OCTOBER 15, 1877.

A creditor, whose claim is provable but has not been proved, may prosecute to final judgment an action against the bankrupt, if the assignee does not intervene and no motion for a stay of proceedings is made.

HENRY HOLLAND v. EDSON S. MARTIN.

H. H. Cond, for the defendant.

C. Delano (*J. C. Hammond* with him), for the plaintiff.

GRAY, Ch. J.—This is an action upon a promissory note. The defendant, in his answer to the merits, pleaded that be-

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fore the commencement of this action the defendant was duly adjudged a bankrupt, that the debt sued upon was provable and proved in bankruptcy, and would be barred by a certificate of discharge, and that the proceedings in bankruptcy were still pending.

At the trial before the Chief Justice of the Superior Court, without a jury, there was no dispute as to the correctness of the plaintiff's claim; the defendant proved the allegations of his answer, except that it appeared that the claim had not been proved in bankruptcy, and that there was still opportunity for the plaintiff so to prove it, the third meeting of creditors not having been held; and it also appeared that the plaintiff was the defendant's assignee in bankruptcy.

The defendant, as the bill of exceptions states, made no claim that the case should be continued to enable him to obtain a certificate of discharge, but asked for a ruling that his bankruptcy was a bar to the action, and that upon the facts above stated the action could not be maintained. The presiding judge declined so to rule, and ruled that upon the facts the plaintiff was entitled to recover, and gave judgment accordingly; and the defendant alleged exceptions.

At the argument in support of the exceptions, the defendant's counsel referred to the following provisions of the Bankrupt Act: By the United States Revised Statutes, Section 5105, "No creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against bankrupt, but shall be deemed to have waived all right of action against him; and all proceedings already commenced, or unsatisfied judgments already obtained thereon against the bankrupt, shall be deemed to be discharged and surrendered thereby." By the United States Statutes of June 22, 1874, Section 7, this section has been amended by adding, "But a creditor proving his debt or claim shall not be held to have waived his right of action or suit against the bankrupt where a discharge has been refused or the proceedings have been determined without a discharge."

By the United States Revised Statutes, Section 5106, "No creditor whose debt is provable shall be allowed to prosecute to

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final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the Court in Bankruptcy on the question of the discharge, provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the Court in Bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed."

If the defendant had established the allegation of his answer that the plaintiff had proved his debt in bankruptcy, the questions would have been presented whether, under Section 5105 as amended, an adjudication in bankruptcy was a bar to an action subsequently commenced against the bankrupt by a creditor who had proved in bankruptcy the debt sued on. But the defendant failed to establish that allegation. The only provision of the Bankrupt Act which restrains a creditor, whose claim is provable, but has not been proved in bankruptcy, from prosecuting to final judgment an action against the bankrupt, is that contained in Section 5106; and this court has repeatedly decided that under this provision the action is not absolutely barred, but that, if the bankrupt does not move for a stay of proceedings for the purpose of obtaining and pleading his discharge, and the assignee does not intervene in defence of action, the court may proceed to judgment. (*Dunbar v. Baker*, 104 Mass., 211; *Cutter v. Evans*, 11 N. B. R., 448, 115 Mass., 27; *Ray v. Wight*, 14 N. B. R., 563, 119 Mass., 426.)

The defendant has referred us to two opinions delivered in the federal courts—the one by Judge Drummond, in the Circuit Court of the United States for the Western District of Wisconsin, and the other by Mr. Justice Davis, in the Supreme Court of the United States. (*In re Williams*, 11 N. B. R., 145, 6 Biss., 233, 236; *Wills v. Claffin*, 92 U. S., 135, 141.) But the observation of Judge Drummond, that the creditor "should not

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have commenced an action against the bankrupts in the State Court after the proceedings in bankruptcy had been instituted," had reference to an action in which the debtor, after having been adjudged a bankrupt, was arrested, in direct contravention of Section 5107 of the Bankrupt Act. And the general remark of Mr. Justice Davis, that the "Bankrupt Act prevents the institution and prosecution of suits against parties in bankruptcy," was made in deciding that an adjudication in bankruptcy against the maker of a promissory note was evidence in favor of the holder, in an action brought by him against another to the note, that a suit against the maker would have been unavailing. The opinions thus expressed cannot, as it seems to us, be applied to this case, without disregarding the plain meaning of the Bankrupt Act, and the opinion and decision of the Supreme Court in *Doe v. Childress*, (11 N. B. R., 317, 21 Wall., 643.)

As the proceedings in bankruptcy did not constitute an absolute bar to the action, and neither the defendant nor the assignee moved for a suspension or a continuance, judgment was rightly rendered for the plaintiff.

Exceptions overruled.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

OCTOBER 28, 1878.

A creditor who has appeared at any session of the first meeting in composition and taken part in its proceedings, but is not present when the vote is taken, is to be counted as voting against the resolution, unless he has clearly indicated his purpose to withdraw and not to be counted.

In re ARCHIBALD M. RICHMOND and H. MURRAY RICHMOND.

The facts appear fully in the opinion.

George E. King and Herbert T. Ketcham, for the alleged bankrupts and for assenting creditors.

Melville H. Regensburger, for the opposing creditors.

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CHOATE, J.—This is a motion to confirm a composition. It appears from the report of the register that the first meeting was adjourned from time to time for the examination of the debtors and for other purposes. At the first session two creditors appeared and filed proofs of their claims. The report shows that their appearance was as creditors summoned by the notice and with a present design of being considered as present at and participating in the meeting. They were not actually present nor represented by proxy at the last session of the first meeting, when the vote was taken on the resolutions accepting the proposed composition. The resolutions were reported by the register as adopted by the vote of the requisite three-fourths in value of the creditors assembled, although, if the claims of these two creditors had been computed in the sum total of the claims of the creditors assembled, there would not have been the requisite three-fourths. These creditors appeared at the second meeting, and took this objection to the regularity of the proceedings because their claims were not counted. The question is whether they should have been considered as present at the first meeting for the purpose of computing the amount of the claims, three-quarters of which in value were requisite to the adoption of the composition. I think it is clear that they should have been considered as present, and their claims computed in the sum total of the claims of the creditors present at the meeting. The statute provides: "And such resolution shall, to be operative, have been passed by a majority in number, and three-fourths in value of the creditors of the debtors as assembled at such meeting, either in person or by proxy," etc. The learned counsel for the debtors insist that the word "assembled" requires that the creditors should be actually present in person or by proxy at the very time the vote is taken, but I think this construction would be too narrow and literal of a statute which must be construed with reference to the subject matter and the peculiar nature of the proceeding to which it relates. The statute contemplates and provides for proceedings at this meeting of creditors which often protract it to a great length, and render

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many sessions necessary. In practice, it is well understood that the examination of the debtors by one or more creditors often runs through many sessions, while the general purpose of the meeting is finally to act on a single question in which all the creditors have a like interest; yet the proceedings at the meeting are to a great extent, as they are conducted, proceedings between the debtors and particular creditors. It was not the intent of the statute that creditors should be obliged to employ counsel to represent them, nor was it within the contemplation of the statute that they should ordinarily do so. They have a right to appear in person. It is so expressed in the statute. Now it would to a great extent defeat the beneficial purposes of the act to oblige every creditor who appears to remain through all these proceedings. Every creditor may have and does have the full benefit of all the investigations made at the meeting by every other creditor, but each one is there to look out for his own interest. He may, if he chooses, refuse to join in the composition, whatever may be shown at the meeting. The meeting is not a meeting of judges, to pass on what appears in evidence, but a meeting of creditors to vote according to their own views of their own interests. I think, therefore, that it would be an entirely impracticable and unreasonable construction of the act to require a creditor who has once appeared at the meeting, and thereby clearly indicated his purpose to be a participant in its proceedings, to remain during all its sittings. It cannot be known when the meeting will be closed and the vote taken; and I think the better view of the statute is, that if at any session the creditor appears and makes proof of his debt as part of the proceedings of the meeting, or having at any other time made proof of his debt, appears and indicates his purpose to participate in the meeting, he is to be deemed constructively present till the end; that he is to be regarded as one of the creditors "assembled" at the meeting. And this construction does no violence to the language of the act. Further support is given to this view by the fact that the vote is not required to be taken by yea and nay. All creditors present and not voting must

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still be counted. It is clear that the requisite majority is three-fourths in value of those who assemble at the meeting. A creditor who has appeared may perhaps withdraw so that he would not be counted, but nothing short of a clear indication to the register, by the creditor, of his purpose to withdraw and not be counted should be sufficient for this purpose. His mere absence, when those creditors who approve the composition are called upon to declare such approval, cannot be taken as indicating any such purpose, but, on the contrary, even if he knows that the vote is then to be taken, it only indicates that he has no desire to vote for the composition.

Motion denied.

SUPREME COURT—COLORADO.

FEBRUARY TERM, 1876.

Payments to the Government, although with intent to give a preference, are not forbidden by the Bankrupt Act.

A deputy U. S. revenue collector becoming insolvent, subsequently and within four months of his adjudication as a bankrupt, paid over to defendant, his principal, moneys received by him in the line of his duty as such officer. *Held*, That such payment was not an unlawful preference within the meaning of Section 35 of the Bankrupt Act.

TIFFANY et al., Assignees, &c., of NATHANIEL YOUNG v. MORRISON.

HALLERT, Ch. J.—Collectors of revenue have authority by law to appoint deputies as they shall think proper, and to revoke such appointments. Security may be taken from the persons so appointed to secure a faithful discharge of duty, and the collector is responsible for their conduct in office.

Within their districts such deputies have the same authority to collect taxes as the collector himself, and when the collector is unable to act, or there is a vacancy in the office, his duties

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may be performed by one of them. U. S. R. S., p. 606, Sec. 3148 et seq.

Whether a deputy collector is regarded as an officer of the Government, or as the agent of the collector merely, all must agree that money received by him in virtue of his appointment belongs to the Government.

To protect himself from liability, the collector has a remedy against his subordinates, but the money collected is in fact and in law due to the Government from the taxpayer, and the deputy collector and his principal as well are agents of the Government to receive it. If, after receiving money on behalf of the Government, a deputy collector converts it to his own use, it is plain that the Government may hold him directly responsible in an action for money had and received, although it has another remedy against his principal.

The circumstance that the collector is liable for money received by his deputies cannot affect the right of the Government to recover its own from one who unlawfully withholds it.

If, then, the bankrupt, as deputy to defendant, collected taxes due to the United States, and afterwards converted the same money to his own use, in respect to that money he was indebted to the Government. It may be conceded that after the conversion took place, the bankrupt did not occupy the position of a trustee in charge of specific property, but he was nevertheless a debtor to the Government for the money which he had received as its agent. The collector was authorized to receive such money on behalf of the Government, and payment to him exonerated the bankrupt.

The case presented is of payment to the Government of money due from an insolvent debtor within four months before the filing of a petition in bankruptcy against the latter, the agent of the Government, who received the money, having reasonable cause to believe that such debtor was insolvent. Assuming that such payment was made with a view to give a preference to the Government, we are now to consider whether such payment was void under the thirty-fifth section of the Bankrupt Act. Upon this point, it is to be observed that the

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act forbids only such preferences as are given to a creditor or person having a claim against the bankrupt, and it has been recently decided by the Supreme Court that the Government is not included in the term, "creditor," as used in the act. (*U. S. v. Herron*, 9 N. B. R., 535, 20 Wall., 251.) The question presented in that case was, whether a debt due the United States was discharged by proceedings in bankruptcy; and after reviewing the act at length, the conclusion was reached that it was not in any way applicable to the Government, except the twenty-eighth section, which regulates the order of paying debts due from the estate.

The word "person," which is found in the thirty-fifth section, was obviously inserted to describe those who, not being creditors of the bankrupt, had assumed some liability for him, and does not enlarge the meaning of the term creditor.

In this view of the law, it is clear that a preference given to the Government by the bankrupt was not prohibited by the thirty-fifth section of the act, because it was not given to a "creditor or person having a claim against him," within the meaning of that section.

Payments to the Government, although with intent to give a preference, are not forbidden by the act, and therefore they cannot be avoided by its provisions.

This reasoning is equally applicable to the thirty-ninth section, which is to be read in connection with the thirty-fifth. Other considerations support the judgment given in the court below, but it is not necessary to refer to them.

The judgment is affirmed with costs.

UNITED STATES DISTRICT COURT—MAINE.

Where one of the motives which prompts a conveyance by one member of a firm to his partner of his interest in such firm is to hinder and defeat creditors, such conveyance is fraudulent at common law, and is denounced by the express provisions of the Bankrupt Act, although other considerations may also have induced the conveyance.

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A creditor of the bankrupt having issued an attachment against him, defendant, who was the bankrupt's partner, procured a delay in its execution, and in the meantime purchased the bankrupt's interest in the firm for four hundred dollars, without taking account of stock or of firm debts and assets. The purchase money was returned to defendant, who placed it in a safe from which it was drawn out by the bankrupt from time to time as he called for it. In an action by the assignee in bankruptcy to invalidate the sale, defendant claimed that he purchased the bankrupt's interest for the sole purpose of getting rid of him and protecting his own interests. *Held*, That both parties to the transaction were chargeable with having contemplated the result accomplished thereby, and must be considered guilty of intending to hinder and delay this creditor in obtaining security for his demand.

BURRILL, Assignee, &c., v. LAWRY.

E. F. Webb and *S. S. Brown*, for complainant.

D. D. Stewart, for defendant.

Fox, J.—Farnsworth was adjudged bankrupt July 25, 1876, on an involuntary petition filed June 19th, and the complainant was duly appointed assignee, and now brings this bill to invalidate an assignment made by the bankrupt to defendant on the 26th day of April, 1876, of all his interest in the co-partnership effects of O. W. Lawry & Company, a firm composed of the bankrupt and said Lawry. It is claimed in the bill, *first*, that this assignment was made in fraud of Farnsworth's creditors, and for the purpose of delaying and hindering them in collecting their demands, and that the consideration therefor was grossly inadequate; and *second*, that Farnsworth was indebted to Lawry, and he thereby obtained a preference in fraud of the Bankrupt Act. The answer denies all fraud and fraudulent preference, and avers that the bankrupt was not indebted to the defendant, but that the respondent "being of opinion and belief that he could manage the business of said co-partnership better alone than in company with said Farnsworth, and that if said co-partnership continued it would soon be unable to pay the partnership debts with the partnership property, he believed his only prudent course was to buy said Farnsworth out and get rid of him, and he did so, paying him in cash the full value of his interest, and more, too, than any other person could possibly have afforded to pay."

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Farnsworth was a tailor, and in May, 1873, formed a co-partnership with Joseph M. Fogg, for carrying on the clothing business at Fairfield. They continued in trade until October 13, 1875, when the defendant purchased the interest of said Fogg, and a new firm was formed, under the style of O. W. Lawry & Company, between said Lawry & Farnsworth. Fogg received for his interest in the firm of W. P. Farnsworth & Co., nearly two thousand three hundred dollars, with Lawry's agreement to indemnify him against firm liabilities to the extent of three thousand dollars. The debts in fact amounted to three thousand four hundred dollars. At this time Farnsworth was indebted to Fogg in the sum of nine hundred dollars, for which Fogg received Farnsworth's note on six months with a mortgage on his interest in the stock belonging to the firm. This note was not paid at maturity, and the mortgage security was of little account, as most of the goods were disposed of before the note became payable. Fogg, on the 25th of April, commenced an action upon this note, and placed his writ on that day in the hands of an officer with instructions endorsed thereon "to attach defendant's interest in the stock of goods in store in Fairfield village." There is not an entire harmony in the statements of all the witnesses as to what was said and done after defendant received notice of this suit, but from a careful examination of all the evidence, I find that on the afternoon of April 25th the officer notified the defendant and Farnsworth of this writ, and his instructions thereon; that the defendant denied the right of the plaintiff to make such an attachment; that he went with the officer to the attorney of Fogg, who explained to him his views of the law, reading to him from some of the opinions of the Supreme Court of this State; that defendant had not then consulted with any other attorney, and, as it was getting late, he thereupon agreed with the officer and the attorney of Fogg "to let the matter rest just as it was till morning, and he would then do one of two things, either turn out an amount of goods sufficient to pay the debt or get a receipt for the same," and this was assented to by the officer and attorney.

In the course of the evening defendant consulted with an-

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other attorney, and upon his advice, as it was said, the defendant purchased all of Farnsworth's interest in the co-partnership effects for four hundred dollars, taking a bill of sale, and agreeing to pay all the company liabilities. No account of stock or of the debts due to or from the firm was taken, but this sum of four hundred dollars was agreed upon by the parties, as the fair value of Farnsworth's interest in the firm, and this amount was then paid to him in cash by the defendant, by whom the next day, when the officer called upon him, the stock was claimed as his sole and absolute property.

Farnsworth's purpose, it is most manifest, was by this transaction to defeat and prevent an attachment by Fogg of his interest in the firm, and to have the business continue to be carried on by defendant, who agreed to employ Farnsworth as a cutter at the rate of fifteen dollars per week. Lawry knew that Farnsworth was insolvent, and that suit had been instituted on this note of nine hundred dollars, and he could not but have understood the motives which actuated Farnsworth in thus disposing of his interest in the firm, and while he no doubt was anxious to relieve the business from the troubles which would attend an attachment of Farnsworth's interest, he was also ready and willing to assist him in defeating Fogg from obtaining any security for any portion of his claim. If his sole motive in buying out Farnsworth's interest was the protection of his own interest, the least he could have done after the express agreement made by him with the officer and the attorney of Fogg, that matters should remain as they were till morning, would have been to retain the four hundred dollars to pay Fogg, as and for Farnsworth's interest in the concern; but, instead of so doing, after the payment of the sum to Farnsworth, it was returned to Lawry, to be kept in his safe, subject to the control of Farnsworth, by whom the larger portion of it was withdrawn, from time to time, as he called for it.

It is but seldom that a court is called upon to sanction such dishonest and dishonorable conduct as that of the defendant and Farnsworth, and no authority has been produced which, in the opinion of the court, affords the slightest justification therefor.

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It is said it was but a race of diligence between the defendant, to protect his interest as a partner in the co-partnership effects, and a creditor of one member of the firm, to secure his demand by an attachment of the debtor's interest in the firm estate; but the answer to this suggestion is, that the law had already provided what it deemed an adequate protection to the partner, in case the interest of his co-partner should be taken on legal process. Such a creditor would by so doing obtain only the interest of his debtor as one of the firm in the estate of the firm, after the other members of the firm had been indemnified from the firm estate, against the partnership debts, as well as their own claims against the firm, for all which they had a lien upon the partnership property. Whatever might remain belonging to the debtor, the law had declared should be subject to the claims of the creditors of the individual members of the firm. Such an interest was attachable, and any scheme of the parties to place the same beyond reach of legal process, and to defeat the individual creditor in obtaining security for his claim, was clearly fraudulent at common law, and is also denounced by the express provisions of the Bankrupt Act. The defendant might have sustained loss and inconvenience if the co-partnership had been dissolved by the attachment and sale of Farnsworth's interest in the concern; the business would certainly have been thereby interrupted; but the risk of such losses necessarily attend all co-partnerships, and the law has never yet afforded any protection therefrom, and will not justify a partner in so conducting with his insolvent co-partner and the estate, as to defeat an individual creditor when endeavoring to obtain security by legal process from the interest of his debtor in the firm, which might otherwise be applied to the satisfaction of his demand.

In the opinion of the court, Farnsworth and Lawry were alike actuated by the double purpose to prevent Fogg obtaining security for his demand, as well as to avoid the disturbance of the firm's business by the attachment; and under such circumstances, when one of the motives which prompts a conveyance is to hinder and defeat creditors, such a transfer is certainly fraudulent at common law, although other considerations may

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also have induced the conveyance. The case of *Crowningshield v. Kittridge* (7 Met., 520), sustains this proposition in its fullest extent. (See also *Kimball v. Thompson*, 4 Cush., 446, 447.)

I am aware that Lawry in his testimony insists that his sole motive in the transaction was to protect his interest in the firm. But little reliance should be given to his statements as to his motives after the deception and falsehood practiced by him upon the officer and attorney, which, although denied by him under oath, are proved by the positive testimony of two disinterested witnesses.

It appears that after Fogg's note became payable, he called upon Lawry and Farnsworth to assist him in selecting the goods which were on hand at the time of the execution of the mortgage which conveyed Farnsworth's interest therein, but that neither of them would render him any aid in his effort to get possession of the property; that after the officer had informed them of his instructions, Lawry, by falsehood, delayed the attachment, and during this time, at Farnsworth's suggestion, as he says, the trade was made and completed between them for Lawry's purchase of Farnsworth's interest in the firm for the sum of four hundred dollars, without taking any account of stock or of the firm debts or assets, and with such haste and so little knowledge of the real condition of the business, that Lawry now contends that he paid much more than his interest was actually worth, although only six months previously, and with little or no material change in the situation of the firm, he had paid Fogg, the retiring partner, nearly two thousand three hundred dollars for his interest in the concern. Farnsworth paid no part of the amount thus received by him from Lawry to Fogg, but the whole was returned to Lawry for safe keeping, and by him deposited in his safe, the whole being thus placed beyond ordinary process, but in Lawry's control, so that he might probably be able to protect himself if Fogg should persist in his attachment and break up the partnership.

The inevitable result of these proceedings was to defeat Fogg's attachment, and it is but reasonable to hold these parties chargeable with having contemplated the result which they have

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thus accomplished, and they therefore must be considered as guilty of intending to hinder and delay this creditor in obtaining security for his demand, and which the court entertains no doubt was a motive with them both, full as cogent as their purpose to protect the interests of Lawry in the firm estate.

Cases from Maine and Massachusetts reports have been referred to by the learned counsel in defense, in which a creditor has been sustained in receiving from his debtor payment of a *bona fide* indebtedment, although one purpose of the debtor in so doing was to prevent other creditors from being paid. All such cases are wholly different from the present, as in each of them there was an existing *bona fide* debt actually paid, and the common law has always sanctioned a preference of creditors, although it may have absorbed all the debtor's estate, to the exclusion of all other creditors. No such element of indebtedment from Farnsworth to Lawry is claimed by the parties to this conveyance to have here existed. Lawry in his answer denies that he was, at that time, a creditor of Farnsworth, and the court is well satisfied that it was the intention of the parties to defeat the attachment of the debtor's interest in the firm estate, as contemplated by the creditor, and which the law had made liable to be so appropriated.

It is also claimed that the transfer by Farnsworth of all his interest in the co-partnership effects was a fraudulent preference of Lawry as a creditor, within the meaning and intent of the provisions of the Bankrupt Act, it being contended that Lawry was a creditor of Farnsworth for one-half of the amount paid by him in discharge of the liabilities of W. P. Farnsworth & Co., and which sum was paid to him by Farnsworth's release of all his interest in the partnership effects of O. W. Lawry & Co. Some ground for this view is found in Farnsworth's statement in his examination, viz.: "Lawry was to furnish enough money to pay my half of the outstanding bills." As the conclusion that the sale was invalid at common law is decisive of the cause, it becomes unnecessary for the court to examine and pass upon this objection.

It appears that Fogg commenced an action in the State

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Court against Lawry to recover of him, under the provisions of Chap. 113, Sec. 51, R. S. of Maine, for knowingly aiding Farnsworth in fraudulently transferring and concealing his property, double the value of the property. This action was not maintained, but it is relied upon in the answer as a defense to the present suit. It is sufficient to remark that the judgment in the suit, *Fogg v. Lawry*, is not admissible in this cause, and can have no effect in a controversy between the assignee in bankruptcy, who represents all the creditors of the bankrupt, and Lawry, who was successful in the State Court. The fact that Fogg is the only creditor who has proved his claim is of no consequence, as there are many other creditors who may hereafter establish their right to share the assets, if any shall come to the assignee.

At the argument it was claimed that a part of the four hundred dollars paid by Lawry to Farnsworth, viz.: ninety-five dollars and sixty-seven cents, was paid to the United States marshal, as messenger, by Farnsworth, when called upon to surrender his estate, and as this sum has never been tendered back to the defendant, the transfer here impeached must be deemed to have been ratified and confirmed by complainant.

No such question is presented by the pleading. It is not alluded to in any way in the answer, nor does it appear that the complainant has ever received any part of this sum from the marshal. There is no evidence as to the disposition made by the marshal of this sum; whether it was or not restored by him to Farnsworth, or the respondent, after the complainant's demand upon the latter, in writing, for the property, before this suit was instituted, or whether it is or not still in the marshal's hands, subject to the respondent's control. *Qua non apparet non est*; and as it is not established that the complainant has, in any way, affirmed the transfer of this interest in the firm estate of O. W. Lawry & Co., which in the opinion of the court was fraudulent and void against the creditors of Farnsworth, it is so ordered and decreed, and the case is referred to Chas. Hamlin, Esq., commissioner, to ascertain and report

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the fair cash value of the interest of said bankrupt in the estate of O. W. Lawry & Co., thus fraudulently conveyed to said Lawry.

UNITED STATES DISTRICT COURT—KANSAS.

Where a creditor commenced suit, and attached goods and chattels of the debtor, and obtained judgment and an order of sale of the attached property, and a petition in bankruptcy was subsequently filed and the debtor adjudged a bankrupt, the bankruptcy proceedings do not invalidate the judgment lien, although no execution or order of sale had been issued on the judgment.

The attachment had become merged in the judgment, and Section 5044 of the Bankrupt Act only operates to dissolve attachments *pending* when the bankruptcy proceedings are commenced.

J. M. SHELLEY et al. v. HENRY ELLISTON, Assignee, &c., of MARY V. WEISBAUGH.

Messrs. Clough & Wheat, for plaintiffs.

Messrs. Mills & Wells, for defendant.

FOSTER, J.—The plaintiffs, J. M. Shelley & Co., present their petition, and ask for an order that said assignee pay over certain moneys, being the proceeds of a lot of goods on which said plaintiffs claim to have had a lien. On the 16th of August, 1877, Shelley & Co. commenced suit against Mary V. Weisbaugh, before a justice of the peace, to recover the sum of two hundred and sixty-nine dollars, and on the same day caused an attachment to be issued and levied upon a lot of goods of said Weisbaugh. On the 20th of the same month the plaintiffs recovered a judgment for said amount with interest and costs, and an order on the justices' docket that said attached goods be sold in satisfaction of said judgment, but no order of sale or execution was issued by the justice on said judgment until the first day of September, 1877, although the same was dated August 20th.

In the meantime, to wit, August 25th, the said Mary V. Weisbaugh filed her voluntary petition in bankruptcy, and on

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the same day was adjudged a bankrupt, and the assignee was shortly thereafter chosen by the creditors.

Before any sale of said goods was had on said judgment, the assignee took possession of, and sold the same, and now the plaintiffs seek to recover the proceeds thereof.

Under Section 5044 of the Bankrupt Act the assignment to the assignee relates back to the commencement of the bankruptcy proceedings, and vests the title of all property, real and personal, of the bankrupt in the assignee, notwithstanding the same is then attached on *mesne process*, and it dissolves any such attachment made within four months before the bankruptcy proceedings.

The first point made by the petitioners is that the date of the execution is conclusive as to the time it was issued.

That would undoubtedly be correct if the justices' docket did not show the date to be otherwise. The docket shows it was issued on the first day of September.

The law requires the justice to keep a docket, and to enter thereon the date of the issue of the writ (Genl. Stat., Kan., 815, Sec. 188), and the next section makes such entries evidence to prove the facts stated therein. I think the finding of the register as to the date the execution was issued is correct.

The second point made by the plaintiffs is that the adjudication in bankruptcy did not relinquish their lien on the property; that the attachment had become merged into the judgment, and the property having been condemned by the court to pay the judgment was not held on *mesne process*, and that it mattered not that no order of sale or execution had been issued to the constable to sell the same.

It is well settled by all the authorities that if the plaintiffs' claim had not gone to judgment prior to the commencement of the bankruptcy proceedings, the attachment would have been *ipso facto* dissolved by such proceedings, and no lien would have existed.

On the other hand it is equally as well settled that if their claim had gone to judgment, and an execution, or what is the

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same thing, an order of sale, had been issued thereon and levied on the property, their lien would have been good as against the bankruptcy proceedings.

But this case is unlike either, and I can find nothing in the books directly in point.

In the case of *Henkelman et al. v. Smith, assignee* (12 N. B. R., 121), decided by the Court of Appeals of Maryland, goods had been attached on *mesne process*, and sold *pendente lite* by order of the court; judgment was afterwards recovered, and the goods condemned to pay it.

Bankruptcy proceedings were commenced subsequent to the judgment, but before an order had been made to pay over the proceeds to the judgment creditors.

The court held that the assignee was not entitled to the money; that Section 5044 of the Bankrupt Act referred only to attachments *pending* at the time the petition in bankruptcy was filed, and that by the judgment the proceeds of the property become vested in the judgment creditors. That case was much like the case at bar, except the goods had been sold, and the proceeds stood in place of the property.

In the case of *Howe v. Union Ins. Co.* (42 Cal., 528), the creditor brought suit and attached by garnishment money belonging to the debtor in the possession of the Insurance Co. Judgment was recovered and execution issued and the sheriff demanded the money of the garnishee. Subsequently proceedings in bankruptcy were commenced and the debtor was adjudged a bankrupt. The court held, as the judgment creditor had made no *levy* on the fund, that neither the judgment nor execution created any lien on the fund other than that under which it had been previously held. The court says: "But where there is no money or property in the hands of the sheriff under the attachment, prior to the judgment, I do not perceive how the mere fact that a judgment was rendered, and an execution issued but not levied, can have the effect to convert the attachment lien upon a fund in the hands of a garnishee into a lien upon final process." From the foregoing remarks it will be seen that the court makes no intimation as to the effect of a judg-

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ment on attached property actually in the hands of the sheriff at the time.

In the case of *Hudson, assignee, &c., v. Adams et al.* (18 N. B. R., 102), the court holds that when a judgment is recovered in an attachment proceeding, and process issued thereon to sell the attached property, its lien relates back to the service of the attachment, and there is no attachment process in existence upon which Section 5044 can operate. "That this section by its own terms relates to existing attachments," &c.

Now it seems to me that this, in general terms, is the correct construction of that section. That it only operates on attachments *pending* at the time bankruptcy proceedings are commenced, and when the judgment is rendered, and the property in custody is condemned for the payment thereof, there is no longer any attachment in existence. It is merged in the judgment, and the goods are not held by virtue of the attachment, but by virtue of the judgment.

Section 5075 of the Bankrupt Act provides for saving and protecting valid liens on the property of the bankrupt.

Was it necessary that an order of sale on this judgment should have been in the constable's hands at the commencement of the bankruptcy proceedings, in order to save the plaintiff's lien? What additional sanctity could that give it?

It is quite clear that no new *levy* on the goods was required under the laws of Kansas. (Genl. Stat., 786, Sec. 47.)

It says: "So much of the personal property, if any, as may be necessary to satisfy the judgment, shall be sold by order of the justice under the same restrictions and regulations as if the same *had been levied on by execution.*"

I can see no reason why the lien of this judgment would be any more complete because an order of sale had been issued to carry it into execution.

The validity of this lien does not, as in ordinary cases of execution, depend upon a levy to make it good. The court having full jurisdiction has adjudicated that the property then in its custody shall be sold to pay the judgment. I cannot think that Section 5044 can annul or in any manner affect that

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adjudication, and unless the plaintiffs have lost their lien by voluntarily relinquishing the property, or have waived it by their proof of debt and accepting dividends, they are entitled to the order prayed for. The report of the register will be re-committed for further proceedings.

UNITED STATES DISTRICT COURT—N. D. NEW YORK.

A voluntary general assignment for the benefit of creditors bears conclusive evidence upon its face of the intent of the assignor to prevent the property transferred by it from being distributed under the Bankrupt Act.

Such an assignment, although made in good faith and without preferences, is an act of bankruptcy and will defeat a discharge irrespective of the time when it was made. 19 13. 2. 11

In re HENRY W. KASSON.

APPLICATION for discharge.

J. R. Swan, for creditors.

G. W. Adams, for bankrupt.

WALLACE, J.—I must differ from the conclusion of the register in this case, and hold that the creditors opposing the bankrupt's discharge must prevail, although the general assignment made by the bankrupt in trust for his creditors was not fraudulent, was without preferences, and was made more than six months before the bankrupt filed his petition to be adjudicated a bankrupt.

I am of opinion that it is quite immaterial when the bankrupt's transfers of his property were made, so long as they were made in contemplation of bankruptcy, and for the purpose of preventing the property from being distributed under the Bankrupt Act.

I have held repeatedly that such an assignment is an act of bankruptcy, and is void as against the assignee in bankruptcy,

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and notwithstanding my great respect for the authorities which hold differently, I must adhere to the conclusions which I have heretofore entertained.

A voluntary general assignment bears conclusive evidence upon its face of the intent of the assignor to prevent the property transferred by it being distributed under the Bankrupt Act. By such an instrument the debtor not only selects his own assignee, but he selects one who has no power to question or attack a class of transactions which the Bankrupt Act seeks to prevent.

That section of the Bankrupt Act which enumerates the grounds upon which the bankrupt's discharge shall be refused, so far as it refers to his disposition of property in contravention of the Act, does not make time an element of the condition, except in one instance, viz., when he has procured his property to be seized on legal process, in which case this will not defeat his discharge, unless it was done within four months before the commencement of proceedings in bankruptcy.

Upon the rule "*expressum facit cessare tacitum*," the omission of all reference to the time of the transaction, in its relation to the commencement of proceedings in bankruptcy, when the section deals with other dispositions of property in contravention of the Act, is very significant, and in my judgment indicates that these dispositions of property will defeat a discharge, irrespective of the time when they were made.

The Bankrupt Act wisely prescribes, that transfers of property by an insolvent debtor shall not be assailed, unless made within a certain period prior to the commencement of proceedings in bankruptcy; this however is for the safety of persons dealing with the bankrupt, and not for the benefit of the bankrupt himself.

The character of his act is lawful or unlawful at the time it is done. In the absence of express language it would be difficult to believe that Congress intended that a bankrupt should be permitted to place all his property beyond the reach of the body of his creditors, and yet be granted or denied a

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discharge, dependent upon the fact whether or not he might see fit to file his petition in bankruptcy within a given period of time thereafter; and especially when, if he should file his petition promptly, so that the property could be recovered by his assignee in bankruptcy and distributed under the act, his discharge should be denied, while if he delayed until too late to assist in this beneficent result, he should be rewarded by a discharge. Yet this is the construction now sought to be enforced.

My attention has been called to several cases which it is urged hold a different view from those I have expressed. It will be found that none of them hold that a transfer of property, which is in itself an act of bankruptcy, is not a ground for refusing a discharge because not made within four or six months before the commencement of the proceedings in bankruptcy.

Discharge denied.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

OCTOBER 8, 1878.

Where, by the terms of a resolution of composition, it is provided that the property and books of the bankrupts, which have been theretofore held by an assignee under a voluntary assignment, should be returned to the debtors. Creditors who are bound by the composition will be held to have consented to such transfer, and if, by any means, such transfer shall be effected in furtherance of the terms of the resolution, they will not be permitted to undo what has thus been done with consent.

In pursuance of the terms of such a resolution, an *ex parte* order was obtained from the State Court, discharging the voluntary assignee in so far as the decree confirming the composition affected the rights of the creditors, and the assignee thereupon delivered the property and books to the debtors. Subsequently a creditor who had refused to accept the composition notes, and whose debt was contracted by fraud on the part of one of the debtors, moved in the State Court for an inspection of the books, and to vacate the order discharging the assignee. *Held*, That the action of the creditor was a violation of the composition agreement, and

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under the power given the Bankrupt Court to enforce the agreement such action must be enjoined.

In re JANE S. RODGER and JAMES WARDROBE.

Gray & Davenport, for motion.

Chas Wehle, contra.

CHOATE, J.—In this case a composition has been confirmed, by the terms of which it is provided that the property of the bankrupts, and their books of account, which had been theretofore held by an assignee under a voluntary assignment, should be returned to the debtors. After the final order in composition the voluntary assignee applied to the Court of Common Pleas, which is the court having jurisdiction of the matter, and upon proof of the confirmation of the composition, and of the compliance on the part of the debtors with the terms thereof, so far as they were required to do anything as a condition precedent to the return of the property and the books to them, he procured an order of that court discharging the assignee from all further liability on account of his trust as such assignee, in so far as the decree of this court confirming the composition affects the rights of the creditors of said alleged bankrupts.

This order of the Common Pleas having been entered, the assignee re-delivered the property and the books held under the assignment to the debtors, and they are now using the same in their business.

The composition was for thirty-five cents on the dollar in instalments, evidenced by promissory notes, all of which are to become payable within nine months.

The order of the Common Pleas was made on the *ex parte* application of the assignee.

In this state of the case a creditor who has refused to receive the composition notes, and whose debt was contracted by fraud on the part of one of the debtors, or at least who has obtained an adjudication to that effect in a State Court, which adjudication is conclusive upon the facts so far as this court is

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concerned, has made a motion against the assignee, in the Court of Common Pleas, for an inspection of the books and to vacate the order discharging the assignee, and the alleged bankrupts now move for an injunction against the prosecution of this proceeding of the creditor in the State Court.

It is clearly the duty of this court to protect the bankrupts, while in good faith carrying out the terms of the composition, from any action on the part of creditors who are bound thereby, designed either to enforce payment of their debts, or to annoy or prevent the bankrupts from performing the agreement of composition.

No creditor therefore can be allowed to take any action for the purpose of procuring a different disposition of the assets of the bankrupts from that agreed to by the terms of the composition, or of interfering with their carrying on their business, pending payment of the composition, so far as that is expressly or by necessary implication permitted by the resolutions of composition.

In this case it was clearly the intention of the creditors that the debtors should have the unrestricted use and possession, pending the maturity of the composition notes, of their assets and books theretofore in the hands of the voluntary assignee. And it was obvious that such possession and use of the assets and books are ordinarily necessary to enable debtors to carry out the composition and pay the notes, since it is only by such use of the property in the continuance of their business that they have in general the means to perform the composition agreement.

And this stipulation is therefore not to be regarded as one for the debtors' benefit alone, but for the mutual benefit of debtors and creditors.

It is true the creditors cannot by a mere resolution transfer the property from the voluntary assignee, who is not a party to the proceeding in bankruptcy, to the debtor.

But they can, and do give their consent to such transfer; and if by any means such transfer shall be effected in furtherance of the terms of the composition agreement, they will not

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be permitted to take any action to undo what has thus been done with consent.

That is the present case.

The obvious tendency and purpose of the creditor's action is to effect a restoration to the assignee of the assets and books which he has surrendered to the debtors, and this is a violation of the composition agreement, and under the power given to this court to enforce the agreement the creditor must be enjoined from going on with such action.

It is insisted that the *ex parte* order of the Common Pleas was not warranted by the state of facts; that the state assignee should not be discharged till the composition is fully paid; but so far as a creditor bound by this composition is concerned, he is to be held to have consented to the very thing that has been done, and even if thereby some security which he, in common with the other creditors, had in the possession by the assignee of the property under the trusts of the assignment is gone, yet that surrender of security is a part of what the creditors have agreed to in consideration of the benefits to them of the composition agreement, and the creditors cannot be permitted to disturb the action thus taken, even if it be irregular as regards other parties.

It is wholly immaterial that the claim of this creditor is a claim based on fraud. While the question whether such debts are discharged by the composition is conceded to have been a doubtful question of law, yet that question having been passed on in this case adversely to this creditor, it cannot be admitted that the doubt that existed should or can in any way interfere with the granting to the debtors of what is held to be their right under the law.

Injunction granted.

In re Wheeler et al.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

SEPTEMBER 20, 1878.

Where the marshal kept some of the property seized by him on premises which had been leased by the bankrupt, *Held*, That the landlord was entitled to nothing by virtue of the covenants of the lease unless the assignee elected to take the lease and thereby became in fact the assignee thereof; that the estate was liable to the landlord before the appointment of the assignee, not on the ground of contract, but upon equitable considerations for a benefit conferred upon the estate, and the allowance is to be measured by the benefit thus conferred; ordinarily it is the value of the premises for storage of the goods, unless the circumstances are such as to make a greater expense proper.

An execution against the bankrupts was placed in the hands of the marshal previous to the commencement of the bankruptcy proceedings. *Held*, That this created a lien in the creditor's favor which is not affected by the bankruptcy, that it was immaterial whether the goods were the property of one of the partners individually or of the firm jointly, and that such lien is superior to that of the marshal for his charges in the proceedings other than those charges which relate to the goods upon which the lien attaches.

A judgment creditor does not acquire a lien protected under the Bankrupt Law by commencing proceedings supplementary to execution; until the appointment of a receiver, his right is not a lien within the meaning of the Bankrupt Law.

In re GEO. M. WHEELER and W. BAILEY LANG.

THE facts sufficiently appear in the opinion.

J. F. Miller, for assignee.

T. M. Wheeler and *Wm. Tracy*, for landlord.

C. W. Bangs, for execution creditor.

CHOATE, J.—This is a motion to confirm the report of the register as to the disposition to be made of certain funds in the hands of the marshal. They are claimed by the assignee of the bankrupts as belonging to the general estate of the bankrupts, and by John Sedgwick, assignee of another bankrupt, as the proceeds of property on which he had acquired a specific lien prior to the bankruptcy, and a claim is made against them by the landlord of the premises in which some of the property was held by the marshal, this claim being for rent or the use and occupation of the premises.

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1. As to the claim of the landlord, the register has allowed him for the use and occupation of the premises by the marshal eleven hundred and twenty-five dollars for four months' occupation, being at the rate of the rent stipulated for in the existing lease between the bankrupts and the landlord. This is error. The landlord is entitled to nothing by virtue of the covenants of the lease, unless the assignee elects to take the lease and thereby becomes, in fact, assignee of the lease.

The estate is liable to the landlord before the appointment of an assignee, not on the ground of contract, but upon equitable considerations for a benefit conferred upon the estate, and the allowance to be made is measured by the benefit thus rendered, and ordinarily it is the value of the premises for storage of the goods, unless the circumstances are such as to make a greater expense than for storage proper, either for present or future purposes of sale, or for some other purpose. (*In re Lucius Hart Manuf. Co.*, 17 N. B. R., 459.)

This part of the report must therefore be set aside.

The question of the benefit to the estate has not been tried nor determined.

2. It is admitted that Sedgwick, assignee, as execution creditor of Wheeler & Lang, had a lien by levy of execution, prior to the commencement of the bankruptcy proceeding, on a part of the goods which the marshal has sold under direction of the court, the net proceeds of which are three hundred and eighty-eight dollars. This claim is now conceded by all parties.

3. It is also clear that Sedgwick, assignee, is entitled to the further sum of seven hundred and ninety three dollars and eighty-four cents, the proceeds of personal property, office furniture, etc., which were in the possession of one of the bankrupts at the commencement of the bankruptcy proceedings.

An execution against the bankrupts had been previously put into the hands of the marshal. This has been held to create a lien in his favor which is not affected by the bankruptcy. (*In re Hull*, 18 N. B. R., 1.) It is not material whether the goods were the property of Wheeler or of

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Wheeler & Lang jointly. They were in either case bound by the execution except as against *bona fide* purchasers, and the proceedings for the conversion of the goods into money have been without prejudice to the rights of the execution creditor.

4. The rest of the money in the hands of the marshal is the proceeds of the collection of accounts. The execution creditor claims a lien thereon by virtue of proceedings supplementary to execution, which were commenced prior to the bankruptcy, but which never proceeded to the appointment of a receiver, because of the filing of the petition in bankruptcy and the injunction issued thereon restraining the further proceedings under the execution. This claim must be disallowed. It has been repeatedly held, as I understand in this court, that a judgment creditor does not acquire a lien protected under the Bankrupt Law by commencing proceedings supplementary to execution; that until the appointment of a receiver his right, though described as an inchoate lien (16 N. Y., 544), is not a lien within the meaning of the Bankrupt Law.

5. The judgment creditor claims that some part of the accounts collected were the proceeds of the sale of goods in possession of the bankrupts, or one of them, at the commencement of these proceedings in bankruptcy, and afterward sold by Wheeler, one of the bankrupts, in violation of the terms of the injunction of this court. If this is so, it would seem that the lien of the execution which attached to those goods would attach to their proceeds now in the hands of the marshal. But on this point the register has not reported, and the matter must be referred back for further testimony, if desired, and for a further report as to the sources from which the remaining moneys, one thousand six hundred and twenty-one dollars and thirty-six cents, were derived.

6. The claim of the judgment creditor, by virtue of his specific lien under the execution, is superior to that of the marshal for his charges in the bankruptcy proceedings other than those charges which relate to the goods upon which the lien attaches. His charges for service of warrant, etc., must come out of the funds belonging to the general estate of the bank-

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rupt, and not out of the goods on which the judgment creditor has a lien.

Report referred back for further proceedings before the register.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

AUGUST 29, 1878.

A provision in a composition agreement, that the proceedings may be discontinued at any time without notice to the creditors, is to be treated merely as a waiver on the part of creditors of notice of an application to discontinue, and does not bind the court to grant such an application.

A composition is none the less payable in money because the payment is postponed to a future day.

The composition was for seventy-five per cent., payable in twelve equal instalments, the first being in three months and the last in three years from the date of confirmation, to be evidenced by the notes of the bankrupt without other security. It was also provided that upon the giving of the notes all the property of the bankrupt should be surrendered to it. It appeared that the president of the bankrupt, who was also its treasurer, had used the funds and credit of the company to a large amount for his own benefit; that, after his defalcation was discovered, he resigned his office as treasurer, but was continued as president; that none of the trustees have manifested any disposition to punish him or to compel him to make restitution, but have settled the matter by taking his stock and crediting him on his account therefor, and by paying the notes outstanding which were either made or indorsed by him in the name of the corporation. *Held*, That the corporation in its managing officers was not of that unquestionable, personal, and business character that it would be reasonably safe to trust it for three years, pending the payment of the composition, with the property on which the creditors had a hold, and confirmation was accordingly refused.

In re THE McNAB & HARLIN MANUFACTURING CO.

THE facts appear fully in the opinion.

James P. Campbell, for bankrupt.

Niles & Bagley, for opposing creditors.

Gray & Davenport, for certain creditors approving.

CHOATE, J.—This is a motion for a final order confirming a composition. The composition, which has received the assent of more than the requisite number of creditors, is for the pay-

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ment of seventy-five per cent., in twelve equal instalments, at intervals of three months from the date of confirmation, the first being in three months and the last in three years from said date, to be evidenced by the promissory notes of the bankrupt corporation without other security. One of the terms of the composition is, that, immediately upon the giving of the notes, all the property of the bankrupt, valued at about one hundred and twenty-five thousand dollars, is to be surrendered to the bankrupt, and that the proceedings may be discontinued at any time without notice to the creditors.

Several objections are urged by opposing creditors under the general ground that the composition is not for the best interests of all concerned.

1. The objection that the proceedings may under the composition be discontinued so that the court would be disabled from enforcing it in case of default, is not a valid reason for refusing to confirm, because this provision is to be treated merely as a waiver on the part of the creditors of notice of an application to discontinue, and does not bind the court to grant such an application of the debtor, and the practice of the court is to refuse all such applications until the composition is fully performed.

2. The objection that the composition is not payable in money must be overruled. It is none the less payable in money because the payment is postponed to a future day or days and the notes are to be given merely as evidence of and security for the several instalments.

3. The objection that the assets could be made to pay more than is now offered must also be overruled, because, upon a careful examination of all the testimony, it appears that, with the present assets and the present liabilities of the company, it could not be expected that the creditors could do better than this if the estate were wound up by an assignee. And on the question of the amount offered, I concur with the creditors and the register in their opinions, and on this question many matters discussed on the hearing relating to the mismanagement of the affairs of the corporation are wholly immaterial.

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4. But the chief objection to this composition is, that the delay in the payment of the composition is unreasonable and that no security whatever is given for the payment except the notes of the bankrupt corporation.

The length of time proposed, three years, is certainly much beyond the usual period of credit given in these proceedings.

It appears, however, to have been carefully considered and recommended by the creditors, and if the payments were reasonably secured this objection would not in this case be sustained. The time required for debtors to realize out of their property or business the amount requisite to pay the composition must vary greatly with the nature of the business and the property, the amount to be paid, and with other special circumstances. This objection of the length of the credit, however, is closely connected with the other, that there is no security for the payment of the composition.

In two late cases, *In re* Wilson and Greig (18 N. B. R., 300), and *In re* Bloch (Id., 328), the objection that no security is given and that the property is surrendered to the debtor, was carefully considered, and it was held that the principal element in the determination of the validity of the objection is what shall be shown as to the personal and business character of the debtor, and the composition in such case will be confirmed or rejected as upon the proofs it shall appear that the arrangement is or is not judicious and reasonably safe for the creditors.

In the case of a debtor corporation the promises to pay which the creditors receive are necessarily of less value than in case of a natural person of the same means, because the natural person's promise may have a value in the future, notwithstanding the loss of his present property; whereas in case of a corporation, if its property is gone, there is no chance of enforcing its promises against it. The principle of the cases cited applies therefore with even greater force to the case of a bankrupt corporation.

In the present case it appears that this corporation was organized in 1871 or 1872, and took the business and assets of James McNab and John Harlin, metal manufacturers and

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dealers. McNab and Harlin were the principal stockholders and managers of the corporation, the other stockholders being, with one exception, subordinates in the employ of the company. McNab was made the president and treasurer, and had exclusively the conduct of the financial part of the business, and Harlin was made the vice-president, and had the conduct of the mechanical part of the business. This continued till about the 1st of November, 1877.

The business appears to have been prosperous, and large dividends were declared and paid, and the president and vice-president were each paid a salary of five thousand dollars. Then it was suddenly discovered, by the confession of McNab, that he had abused his trust, had used the funds and credit of the company for his own business in land speculations, to the amount of about one hundred and thirty thousand dollars; that there were then outstanding about eighty-three thousand dollars of paper of the company, on which it was either maker or endorser, the proceeds of which had been thus used by McNab fraudulently for his own benefit. The evidence shows that up to that time Harlin knew nothing of these fraudulent transactions. The whole capital stock of the company was about one hundred and seventy thousand dollars, of which McNab owned fifty thousand dollars. The last previous account of stock or inventory showed a surplus of assets over and above the capital, so that this fifty thousand dollars stood on the books at the value of seventy-nine thousand dollars; but it is evident, from the testimony as to the actual value of the assets shortly after this period, that the valuation of the assets on the books, which was at their cost price, had become grossly excessive, and making allowance for this excess and for the debts thus fraudulently contracted by McNab on the part of the corporation, it was at least a matter of doubt whether at the time of this discovery the corporation was solvent, if these fraudulent debts were assumed by it.

McNab resigned his office as treasurer, but was continued as president till a few days before the commencement of these bankruptcy proceedings in April, 1878. The financial part of

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the business was at once assumed by and has ever since been carried on by Harlin. Under advice of counsel that the corporation was legally bound on the outstanding fraudulent notes, the trustees agreed to assume them, and they were either paid or renewed at maturity, and, before the commencement of these proceedings, had been fully paid. I do not think the criticism of the counsel for the opposing creditors, that the corporation thus assumed debts against which it could have defended, is borne out by the evidence. Though the notes were usurious this would have been no defence to a corporation, and the holders, so far as appears, were mostly, if not altogether, innocent holders for value, and McNab had apparent authority to issue the paper.

The corporation took from McNab his stock, giving him credit for seventy-nine thousand dollars on his account. This was virtually foregiving him that amount of his indebtedness. Neither Harlin nor the trustees have manifested any disposition to punish him or to compel him to make restitution, and the settlement made with him and with the holders of the fraudulent notes was such as to release him from the consequences of his crimes, and to secure the payment of the paper fraudulently issued by him, regardless of whether the proper business creditors of the company would be paid in full or not. The case called for the most stringent measures against McNab; but instead of procuring his being sent to the penitentiary, the managers of this corporation have apparently in all things consulted his interests in conducting its affairs since the discovery of his frauds; and while there is nothing directly reflecting on the personal integrity of Mr. Harlin or the other trustees, who indeed are mere nominal trustees of the corporation, I think it cannot be held that the corporation in its managing officers is of that unquestionable personal and business character that it is reasonably safe to trust it for three years, pending the payment of the composition, with the property on which the creditors now have a hold. I have not overlooked the very large majority by which the creditors have approved this composition; but giving the action of the creditors its due weight,

In re Riker.

I am compelled to withhold the confirmation of the resolutions.

Motion denied, unless within ten days proceedings are duly instituted for a modification of the terms of composition or for securing the payment thereof, in which case the motion may be renewed.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

AUGUST 8, 1878.

A note for two hundred and fifty dollars, which falls due four days after the filing of the petition, is not a provable debt for two hundred and fifty dollars at the date of such filing.

An endorser of the bankrupt's paper who has, before the filing of the petition, become absolutely liable to the holders by due notice of its dishonor, is not a creditor of the bankrupt at the time of such filing.

On the objection that the petitioners in the original petition were insufficient in amount, a supplementary petition was filed by a creditor holding a claim exceeding two hundred and fifty dollars, and the debtor filed an admission that the petitioners in the two petitions constituted at least one-fourth of all his unsecured creditors whose provable claims equalled or exceeded two hundred and fifty dollars, and that the debts owing to said petitioners amounted in the aggregate to at least one-third of all the debts provable against him by that class of creditors. *Held*, Insufficient to show that the requisite number and amount have joined; it is essential that the petitioning creditors whose debts equal or exceed two hundred and fifty dollars should be one-fourth of all that class of creditors.

In re GEORGE RIKER.

THE facts appear fully in the opinion.

Taylor & Fowler, for attaching creditors.

Francis E. Burrows, for petitioning creditors.

CHOATE, J.—On the nineteenth day of July, 1878, certain creditors of the alleged bankrupt filed a petition, in which they averred that their demands respectively exceeded two hundred and fifty dollars, and that they constituted one-fourth at least in number of the unsecured creditors whose debts equalled or exceeded two hundred and fifty dollars, and that their demands

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amounted in the aggregate to at least one-third of all the debts provable. On the return day of the order to show cause, the debtor appeared and also a creditor who had procured an attachment, which will be avoided if an adjudication is made, being within four months of the filing of the petition :

The creditor objects to an adjudication, on the ground that the petition is insufficient in the following particulars :

1. The demand of one of the petitioners, as set forth in the petition, is on a note for two hundred and fifty dollars, which fell due July 23, 1878, four days after the filing of the petition. The amount that can be proved on it is therefore the amount of the note, with a rebate of four days' interest. It is therefore not a demand for two hundred and fifty dollars.

2. Two of the notes, constituting parts of the demands set forth in the petition as the demands of two of the petitioning creditors, are notes made by the debtor and delivered to such petitioning creditors, and by them endorsed and delivered for value to third parties, who now hold the same. Prior to the filing of the petition, the petitioning creditors became liable absolutely to the holders by due notice of the dishonor of the notes.

The amount of these two notes is five hundred and fifteen dollars and thirty-nine cents.

This objection being made, the petitioning creditors produce and file a supplemental petition by another creditor holding a demand amounting to sixteen hundred and eighty-four dollars and fifty-four cents.

The debtor appears and files an admission that the petitioners in the original and supplemental petitions constitute at least one-fourth of all his unsecured creditors holding provable claims equal to or exceeding two hundred and fifty dollars, and that the debts owing to said petitioners amount in the aggregate to at least one-third of all the debts provable against him by that class of creditors.

The objections taken to the petition are well founded.

It is clear that under Section 5067 the note for two hundred and fifty dollars, falling due July 23, was not on the

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19th of July a provable debt for two hundred and fifty dollars, but for something less.

It seems also that the two notes objected to were not demands due absolutely to the petitioning creditors, but on which, in case the holders should not prove, they could make proof under Section 5070, in the creditors' name or otherwise.

The holder is the creditor who, in the first instance, has exclusively the right to prove, and the liability of the maker to the endorser is only contingent in its nature, and his claim is only provable in a certain event which cannot happen till after the adjudication, viz.: the neglect of the holder to prove. So far as these notes are concerned, therefore, the petitioning creditors were not creditors of the alleged bankrupt at the time of the filing of the petition.

These defects in the petition, however, furnish no reason for the dismissal of the petition, which appears to have been filed in good faith, especially as the debtor has appeared and does not object to an adjudication.

The statute provides that if it shall appear that such number and amount have not so petitioned, the court shall grant such reasonable time, not exceeding ten days, within which other creditors may join.

The supplemental petition is regular, and is properly filed; but both petitions together, and the debtor's admission, do not show that the requisite number and amount of creditors have yet joined.

The admission is insufficient, because it states that the number of petitioning creditors in said two petitions constitute one-fourth of all creditors whose debts equal or exceed two hundred and fifty dollars, whereas it is essential that the petitioning creditors, whose debts equal or exceed two hundred and fifty dollars, should be one-fourth of all that class of creditors.

The admission fairly interpreted means that the five petitioning creditors are one-fourth at least of all the creditors whose debts equal or exceed two hundred and fifty dollars, but, after excluding the note not held by the petitioning creditors, there are two of the petitioning creditors whose demands are

In re Hopkins.

less than two hundred and fifty dollars. So that there are but three petitioning creditors of that class, and there is no evidence that *they* constitute one-fourth of that class of creditors.

If, in point of fact, the requisite number and amount have already joined, the difficulty may be removed by an amendment of the petitions, or of the debtor's admission. If not, the petitioners should have time to make up the number.

Motion to dismiss denied.

The petitioners to have ten days, within which other creditors may join, and to have leave to amend their petitions as they shall be advised.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

JUNE 19, 1878.

While a creditor at large cannot intervene to contest an adjudication, he may very properly make a suggestion of suspicious circumstances, upon which the court will direct an inquiry to ascertain whether the petition is not collusively and fraudulently prosecuted.

In re SIDNEY W. HOPKINS.

THE facts appear fully in the opinion.

W. B. Hornblower, for moving creditors.

G. H. Forster, for petitioning creditors.

CHOATE, J.—A petition by creditors praying for an adjudication of bankruptcy against said Hopkins was filed and an order to show cause thereon issued May 21, returnable June 1, 1878.

The petition alleges that the petitioners constitute "at least one-fourth in number of the creditors" and that the aggregate of their provable debts "amount to at least one-third of the debts so provable."

In re Hopkins.

The act of bankruptcy alleged is the suspension of and failure to resume payment within forty days of the debtor's commercial paper, "made or passed in the course of his business as a merchant or trader," and the suspended paper is specified as a note dated Nov. 1, 1877, for one thousand and twenty-two dollars and eighty-nine cents, payable to Byerson and Brown.

Upon the return day the debtor made default. Thereupon certain creditors of Hopkins, not being petitioning creditors, move for leave to intervene and file an answer to the petition, in which they allege that they have no information as to whether the petitioning creditors constitute one-fourth in number and one-third in amount of all the creditors, and they therefore deny the same.

They also deny, on information and belief, that Hopkins was at any time a merchant or trader, and especially that he had carried on any business as a merchant or trader within the last four years. They deny the act of bankruptcy in that the note described in the petition was not made or passed in the course of the business of said Hopkins as a merchant or trader, and they allege that it was given for a livery-stable bill, not in the course of his business, but for his own personal uses.

They allege, on information and belief, that the petition was filed collusively in the interest of the alleged bankrupt, and that several of the petitioners are his relatives and friends.

The creditors moving to intervene show no interest other than that of creditors-at-large, except that prior to the filing of the petition they had commenced an action on their claim, and that since the filing of the petition they have proceeded with the action to judgment.

It is settled as the rule in this District, by repeated decisions of Judge Blatchford, that a creditor-at-large, having no special interest to protect, is not entitled to intervene, as matter of right, to contest the adjudication with the petitioning creditors.

I adhere to that rule as already established. And these moving creditors do not show any such special interest as gives

In re Hopkins.

them the right to intervene. They had not acquired a lien or equitable right in any property of the debtor at the time of the filing of the petition.

They have gone on with their suit and perfected their judgment, but since the filing of the petition they cannot acquire any lien on the property by levy or execution. The court, however, is required, upon the return of the order to show cause to be satisfied that the petitioners are entitled to an adjudication, and it has been held that the court should in a suspicious case, either of its own motion or upon the suggestion of any party in interest, direct an inquiry, in order to ascertain whether the petition is not collusively and fraudulently prosecuted for the purpose of obtaining, by false averments as to the facts, a decree to which under the law the parties are not entitled.

Such a suggestion may very properly be made by a creditor. In this case the fact that the debtor has made default, the alleged fact that several of the petitioners are his near relatives, and the fact, alleged upon information and belief, that he has never been a merchant or trader, do afford a reasonable ground for the suspicion that the petition is not filed in good faith, and that the petitioners may not be entitled to the adjudication.

While, therefore, the right of the moving creditors to answer must be denied, the court, upon the suggestion of the matters contained in the moving papers, of its own motion directs a reference of the petition to the clerk to take proof of the matters alleged in the petition upon notice to the debtor and to the moving creditors.

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SUPREME COURT OF ERRORS—CONNECTICUT.

JANUARY, 1877.

An assignee is not bound to take a leasehold estate belonging to the bankrupt, unless it would be beneficial to the creditors for him so to do.

Where the assignee has accepted the lease, and has sold his interest as assignee in the leased premises to the lessor, the lease is thereby extinguished, and the guarantor of the lease discharged from all liability accruing after the commencement of the bankruptcy proceedings.

Semble, That a sale of the lease by the assignee, and the receipt therefor of a large sum of money for the benefit of the creditors involves an acceptance of the lease by the assignee.

CYRUS A. WHITE v. MARTIN H. GRIFFING.

ASSUMPSIT upon a guarantee of the performance by a lessee of his covenants in a lease.

Upon the trial the plaintiff introduced in evidence a written lease made by himself to one Charles E. Griffing and the guarantee of the defendant thereon, with evidence of the due execution of the same, and also evidence to prove that upon the execution of the lease the lessee entered into possession of the leased premises, and continued in possession up to the first day of August, 1875, when he was ejected from the same under an execution issued upon a judgment against him in a suit of summary process in favor of the plaintiff. The plaintiff claimed to recover upon the guarantee a portion of the rent from the 1st of November, 1874, to May 1st, 1875, which was unpaid, and also claimed to recover damages for waste, which he claimed, and introduced evidence to prove, that the lessee had committed upon the premises in violation of his covenants, during the year commencing May 1st, 1874, and ending May 1st, 1875.

The lease was dated April 27th, 1874, and was for the term of eight years from November 1st, 1873, for a yearly rent of five hundred and seventy-five dollars, payable on the first day of January in each year; the rent to commence May 1st, 1874, and the first payment to be made for the rent from May 1st

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to November 1st, 1874; the subsequent rent to be paid from November 1st to November 1st, during the term. The guarantee was of the same date with the lease, was endorsed upon it, and was "for the punctual payment of the rent and performance of the covenants in the within agreement mentioned."

The defendant introduced evidence to prove, and it was not denied, that upon proceedings instituted by certain of his creditors, under the United States Bankrupt Act, the lessee was on the thirteenth day of February, 1875, adjudicated a bankrupt, and F. S. Wildman, of Danbury, appointed assignee of his estate, which estate was now in process of settlement.

The defendant also offered evidence to prove, and it was not denied, that on the seventh day of October, 1875, Wildman, as such assignee, offered for sale at public auction such title and interest as he, as such assignee, had in the leased premises, which was bid off by one Taylor, at whose request the assignee executed to the plaintiff a quit-claim deed of such interest. The plaintiff claimed, and introduced evidence tending to prove, that Wildman as assignee never assumed the ownership of the lease, nor of any interest in the leased premises, nor any possession of the same, but that from the time of his appointment as assignee up to the sale he refused to assume any rights or responsibility in respect thereto, and that the sale was merely experimental to ascertain whether the lease had any value, and that at the time of the sale he declared that he would sell such interest as he had in the premises, if he had any. The defendant denied that the facts upon this point were as claimed by the plaintiff. He also claimed that Taylor in fact acted as agent of the plaintiff in buying the lease at the auction, which was denied by the plaintiff.

The defendant claimed, and it was not denied, that on January 1st, 1875, rent due from May 1st, 1874, was paid, and that the rent from November 1st, 1874, to November 1st, 1875, was not payable under the contract till January 1st, 1876. He also claimed, and offered evidence to prove, that the plaintiff purchased the lease with full knowledge of its terms, and paid two hundred and twenty-five dollars to the assignee for it.

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The defendant requested the court to charge as follows:—

1st. That if the jury should find a purchase of the lease by the lessor from the assignee, and that it was purchased with full knowledge of its condition and the amount of rent paid thereon, the defendant was not liable as surety in this action for rent due after the purchase.

The judge charged, *pro formâ*, that the defendant might be liable, though the assignee sold the lease, and that such liability would extend to May, 1875, unless the assignee assumed ownership of the lease, in which case he would be liable only till February 13th, 1875, but was liable to that time. And that whether the assignee assumed ownership or not was a question of fact for the jury.

2d. That the surety could not be held liable for waste committed on the premises when in legal possession of the assignee.

The judge, *pro formâ*, charged the jury that the law was so, but that it was for the jury to say whether the premises were ever in the legal possession of the assignee. That if he never assumed the ownership or possession of the same, this principle of law had no application to the case.

3d. That the legal possession of an assignee when he sells a lease relates back to the commencement of proceedings in bankruptcy.

The judge charged that this, as a proposition of law, was correct, if the assignee assumes the ownership of the lease or sells as owner. That it was for the jury to say whether the sale in this case was made by the assignee as owner, or was merely experimental, to ascertain what, if anything, would be paid for such interest, if any, as the law cast upon him as assignee, without any assumption by him of any interest in the same.

4th. That a sale of the assignee's interest was in law an acceptance of the lease, and a taking of the possession of the premises by the assignee under the lease.

But the court charged that it was a fact for the jury to find, whether or not the assignee did take possession of the prem-

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ises, or assume the lease, by such offering at public vendue, and such quit-claim deed of his interest, or whether the offering of the same at public vendue was only intended by the assignee to ascertain what, if anything, could be obtained for such interest, if any, as he had in the lease, without assuming the lease or rendering himself liable to perform any of its covenants; and that if the jury should find that the assignee had not taken possession of the premises or assumed the lease, then the defendant would be liable as surety for the performance of the covenants of the lease for such time, according to the terms of the guarantee.

5th. That the taking of the quit-claim deed from the assignee by the plaintiff, paying the purchase money, retaining possession thereafter, and claiming damages in this action for the amount of money so paid, estopped the plaintiff from denying that the sale was a complete sale.

But the court did not so charge.

6th. The plaintiff offered evidence of waste during the first year of the lease. The defendant objected to any evidence of waste between the 13th day of February and 1st day of May, 1875, but the court admitted it, subject to direction in the charge.

And the court charged the jury that such evidence might be taken into consideration by them, provided they should find that the assignee did not take possession of the premises or assume the lease. But that if they should find that the assignee had taken possession of the premises or assumed the lease, they could not take into consideration any evidence of waste committed after the 13th day of February, 1875.

The defendant claimed that the assignee had employed the law firm of Brewster & Tweedy to defend the suit of summary process brought against the lessee by the plaintiff. In reply to this the plaintiff offered the assignee as a witness, who testified that he had no recollection whether or not he hired counsel to defend in the suit, but that he thought he had not assumed the responsibility of a defence of the case. The defendant then offered his own testimony that the assignee had

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in his presence so employed said law firm, but the court refused to admit the evidence.

The jury having returned a verdict for the plaintiff, the defendant moved for a new trial for error in the rulings and charge of the court.

L. D. Brewster, in support of the motion.

1. The defendant asked the court to charge that "the taking of the quit-claim deed from the assignee by the plaintiff paying the purchase money, retaining possession thereafter, and claiming damages in this action for the amount of money so paid, estopped the plaintiff from denying that the sale was a complete sale." But the court did not so charge, but on this, and on all the other requests, assumed that it was still a question of fact for the jury to say whether or not the assignee had accepted the lease. We claim here a treble estoppel. 1st. An estoppel in pais. 2d. An estoppel by record. 3d. An estoppel by an admission in the pleadings. The plaintiff admits, affirms and adopts the sale in all the ways in which a vendee can. He cannot now repudiate it. "A party by actually affirming a contract or purchase, as by suit or the reception of money upon it, is estopped thereafter to deny its force and effect." Bigelow on Estop., 584, and note 1. "Whatever is admitted on the record need not be proved and cannot be disproved." Roscoe on Ev. (12th ed.), 80. But, irrespective of the question of estoppel, the court below erred in leaving it to the jury to decide as a question of fact whether or not the assignee ever assumed possession of the lease. The sale of the lease and receipt of money therefor was, of itself in law, an assumption of the lease. (1 Smith Lead. Cas. [H. & W. Ed., 1872], 1243, and cases there cited; Taylor Land. & Ten., Section 456; 3 Parsons on Cont., 490; *Thomas v. Pemberton*, 7 Taunt., 206.) In *Turner v. Richardson* (7 East., 335), the court held that a mere *offering* to sell was simply an experiment to test value, but the spirit of the whole decision is that if a sale had been actually made, as was here the case, that act would have been an assumption of the lease. Possession is not the test

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of acceptance, it is only an incident. (*In re Ten Eyck*, 7 N. B. R., 26.) If we are right in the foregoing positions we are entitled to a new trial, since the whole case was put to the jury on a false issue, and it is evident from the verdict that the jury were misled by the charge.

2. There was no rent in arrear for which the defendant was liable. His guarantee was for the payment of rent "for one year." It was signed April 27th, 1874. According to its terms this guaranty is only good for one year. It may be construed to cover a year between November, 1873, and November, 1874, or a year from the signing of the same, or from May 1, 1874. But, however the question of the duration of the guaranty is viewed, there was no rent due according to the terms of the lease when the guaranty expired, nor till January 1st, 1876, eight months after the latest possible term of the suretyship had expired, and three months after the landlord had bought in the lessee's right. Rent is not a debt until it is due. (*Perry v. Aldrich*, 13 N. H., 350, and cases there cited; *Russell v. Fabyan*, 28 id., 545; *Wood v. Partidge*, 11 Mass., 488; *Fitchburg Factory v. Melvin*, 15 id., 268; *Van Wicklen v. Paulson*, 14 Barb., 654; *Jacques v. Short*, 20 id., 269, 279.) But if the covenant to pay rent on a specified day creates no debt until the day of payment arrives, how can there be any breach of the covenant before that time? At most the surety only guaranteed that the tenant should perform the covenants from May to November. It is only by construction and implication that he can be held longer. "The contract is not to be extended to any other time than is expressed, or necessarily included in it." (*Burge on Suretyship*, 40; 3 Addison on Cont., Section 1119.)

3. The voluntary purchase of the lease by the landlord put him in the place of the first lessee as regards the surety and released the latter from all rent not then due. When the greater and less estate meet in the same person at law the less estate is annihilated, whether they met by his own act or the act of the law. "*Nemo potest esse et dominus et tenens.*" (*Hughes v. Robotham*, Cro. Eliz., 302; *Woodfall on Land. &*

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Ten., 132, 274, 338; *Reed v. Latson*, 15 Barb., 9; *York v. Jones*, 2 N. H., 454; 3 Sugden on Vendors, 23.) In a lease so merged, rent not due at the time of merger passes as an incident of the reversion and is extinguished. (1 Furlong Land. & Ten., 547; *York v. Jones*, supra; *Stout v. Keen*, 3 Haring 82; *Webb v. Russell*, 3 T. R., 393; *Roach v. Wadham*, 6 East, 289.)

4. It was for the jury to find when the lease was delivered—when the parties went into possession—what practical construction they had put upon the contract by their actions at the time—whether there had been any possession by the first lessee previous to April 27th, 1874; all of which facts might bear materially on the liability of the defendant. When no such facts are taken into consideration, the lease “in computation of time” takes effect from the day in which the term is by the contract to commence, although it be a day in the past. (Taylor’s Land. & Ten., Section 70; *Enys v. Donnithorne*, 2 Burr., 1192; *Bird v. Baker*, 1 Ellis & Ellis, 2, 3, 12.)

5. The assignment by act of the law worked no forfeiture of the lease, however the rule may be in case of voluntary bankruptcy. (Taylor on Land. & Ten., Section 408; 3 Parsons on Cont., 492; 2 Greenl. Ev., Section 245; *Starkweather v. Cleveland Ins. Co.*, 4 N. B. R., 341; Hilliard on Bankruptcy, 141.)

6. The surety defends in this action as well for the bankrupt’s creditors as for himself. Whatever he has to pay as surety he can present as a claim against the bankrupt’s estate. Their equities fully balance any supposed equities of the plaintiff on the questions of merger and apportionment.

7. The rejected evidence should have been admitted. (*Crowley v. Page*, 7 C. & P., 789; *Yeaton v. Chapman*, 65 Me., 126.)

O. A. G. Todd and *W. F. Taylor*, contra.

1. The objections to the charge of the court are all based upon the sale of the interest of the assignee in the lease, the defendant claiming, and asking the court in various ways to

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charge the jury, that such sale was in law an assumption of the lease and a taking possession of the leased property by the assignee. The court made substantially the same charge as to all the requests, that if the assignee assumed the lease and took possession of the property, with the intention of assuming the responsibility of the covenants in the lease, then the surety would be discharged of his liability as surety under the lease; but that if the assignee did not so assume the lease and take possession of the property, then the defendant would not be so discharged; that it was a fact for the jury to find whether or not the assignee had assumed the lease and taken possession; that if they should find that he had done so the defendant would be discharged from his liability after the 13th of February, 1875, otherwise he would not be discharged as such surety. This charge was more favorable to the defendant than he was entitled to. An assignee is not obliged to assume a lease of property given to the bankrupt. He has his election to assume the lease or not, and has no interest in it until he makes such election to assume the lease and takes possession of the property, and until such election is made by him the lease and property remain in the bankrupt. (3 Parsons on Cont., 467, note *t*.)

2. Such election must be made in a reasonable time. (*Tuck v. Fyson*, 6 Bing., 321; 3 Parsons on Cont., 467, note *t*; 2 Smith Lead. Cas. (7th Am. ed.,) 1243.) The motion finds that the bankrupt remained in possession of the property described in the lease until August, 1875, and until he was ejected by virtue of an execution in a judgment of summary process. The sale was not made until the month of October following, and when the lessor was in possession of the premises. If possession was taken by the assignee by this sale, it was not within a reasonable time.

3. The bankrupt lessee, by the terms of the lease, only had the right to possess and enjoy the use of the property, without any power to assign it to a third person without the written permission of the lessor. Consequently no estate passed to the assignee by the bankruptcy of the lessee. (*In re O'Dowd*, 8

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N. B. R., 451; Bump on Bankruptcy, 9th ed., 490.) Voluntary and involuntary bankruptcy stand upon the same ground in their effect upon such a lease. (Bump on Bankruptcy, 491; *Starkweather v. Cleveland Ins. Co.*, 4 Bank. Reg., 341, 2 Abb. C. C., 67; *Perry v. Lorillard Ins. Co.*, 14 N. B. R., 339, 61 N. Y., 214.)

4. Under the bankrupt law the discharge of the bankrupt does not discharge, release, or affect the defendant as surety or guarantor in this lease, but he is holden in the same manner as if no proceedings in bankruptcy had been commenced. (U. S. Statutes, secs. 5, 118; Bump on Bankruptcy, 732; *In re Levy*, 1 Bank. Reg., 327, 2 Ben., 169; *Cluflin v. Cogan*, 48 N. H., 411; *Jones v. Russell*, 11 N. B. R., 478, 44 Geo., 460; *Payne v. Able*, 4 N. B. R., 220, 7 Bush, 344; *Morse v. Waller*, 1 A. K. Marsh., 488.)

PARK, C. J.—It was an important question, in this case, whether Wildman, the assignee in bankruptcy, had elected to appropriate the lease in question for the benefit of the creditors of the bankrupt, and had performed some act of ownership over the property in pursuance of such election. He was not bound to take the property and appropriate it for such purpose unless the lease was valuable. His duty required him to determine whether the lease would or would not be beneficial to the creditors of the bankrupt, and to act accordingly.

In *Turner v. Richardson et al.* (7 East., 336), Lord Ellenborough says: "It has been decided that assignees of a bankrupt are not bound to take what Lord Kenyon called a *damnosa hæreditas*; property of the bankrupt which, so far from being valuable, would be a charge to creditors; but they may make their election. If, however, they do elect to take to the property, they cannot afterwards renounce it because it turns out to be a bad bargain." Gross, J., says, in the same case: "They were assignees of a bankrupt's estate for the benefit of his creditors, and they were to consider whether it were for the benefit of the creditors that they should take to the property or

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waive it. On the one hand, if they entered and were possessed, they became liable to be sued upon the bankrupt's covenants for rent and non-repair, which might amount to more than the value of the lease; on the other hand, if the lease were valuable, and they did not take to it, the creditors would have had a right to call upon them for neglect of their duty."

Chitty, in his work on Contracts, page 240, says: "It is clear that the interest of the bankrupt in any such land, or under any such conveyance or agreement for a conveyance, or lease or agreement for a lease, does not vest in his assignees absolutely by virtue of the fiat; but such interest remains in the bankrupt until the assignees do some act amounting to an acceptance thereof."

In *Copeland v. Stevens* (1 Barn. & Ald., 593), the court says: "The assignees of a bankrupt are not bound to accept a term of years that belonged to the bankrupt, subject to the rents and covenants, for the object of the statute and of the assignment being the payment of the bankrupt's debts, and the assignees under the commission being trustees for that purpose, the acceptance of a term which, instead of furnishing the means of such payment, would diminish the fund arising from other sources, cannot be within the scope of their trust and duty."

Parsons, in his work on Contracts, Vol. 3, page 489, says: "If the assignee elects not to take, the lease remains in the bankrupt, with all its advantages and all its burdens, and free from all claims or right either of the assignee or of the creditors."

Washburn, in his work on Real Property, Vol. 1, page 340, says: "And in cases of general assignment by insolvents, or by proceedings in insolvency, the assignee will have a reasonable time in which to ascertain whether the lease can be made available for the benefit of creditors, before he will be obliged to make his election" (whether he will claim the lease under the assignment or not).

It follows, therefore, if Wildman the assignee did not accept the assignment of the leasehold estate of the bankrupt,

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that the lease remained the property of the bankrupt, and consequently the defendant would be liable on his guaranty, inasmuch as it appears that the rent which had accrued during a part of the time covered by the guaranty is in arrears.

If Wildman accepted the assignment, then it follows that he sold the interest of the bankrupt in the lease to the plaintiff, who was the lessor of the property to the bankrupt, and both the lease and the guaranty thereby became extinguished before the year covered by the guaranty had expired; for the acceptance of the assignment of the lease took relation from the time when the bankrupt proceedings were instituted, which was before the year covered by the guaranty had expired, and consequently there could be no liability on the part of the defendant.

Hence the liability of the defendant turns upon the question whether or not Wildman accepted the assignment of the lease.

During the trial of the case in the court below, the defendant, in order to show that Wildman did in fact accept the assignment of the lease, offered evidence to show that he employed counsel to defend an action of summary process brought by the plaintiff against the bankrupt. The plaintiff offered Wildman as a witness, who testified that he had no recollection whether he employed counsel to defend the bankrupt in the suit or not, but thought he did not assume the responsibility of defending the case. The defendant in rebuttal offered a witness to prove that he heard Wildman engage counsel to defend the suit.

The plaintiff objected to the reception of this evidence, and the court excluded it, and we think the court erred in so doing. The suit was brought after Wildman had been appointed assignee, and if he then had accepted the assignment of the lease it would be expected of him to defend the bankrupt. This evidence, therefore, was pertinent and important evidence upon the question whether he had accepted the assignment.

It does not appear upon what ground the objection to the

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evidence was based, but probably upon the ground that it was evidence in chief, and was not proper rebutting testimony. But after Wildman had testified that he thought he did not assume the responsibility of defending the suit, the evidence was proper to disparage his testimony, and thereby support the evidence which had been offered in chief. His testimony tended to establish the fact that he did not employ counsel to defend the suit, although he did not testify positively on the subject. Doubtless the evidence offered in rebuttal might have been given in chief; still, inasmuch as it was not done, it was properly admissible in rebuttal to discredit the testimony of Wildman.

We have refrained from deciding whether the court below erred in omitting to charge the jury, as the defendant requested, that the sale of the assignee's interest in the lease, and the acceptance of quite a sum of money as the proceeds of the sale, were in law an acceptance of the lease under the assignment, for if the question of acceptance is one of fact, a new trial must be advised, on account of the ruling which we have just been considering, the evidence rejected by the court being admissible upon the question of acceptance as one of fact; and if the question be one of law, and the court therefore erred in refusing so to charge the jury, we could do no more than grant a new trial.

We will say, however, that it is difficult to see how an assignee in bankruptcy can sell the lease of the bankrupt, and receive therefor a large sum of money for the benefit of creditors, without accepting the assignment of the lease.

In *Turner v. Richardson*, supra, the assignees advertised the lease for sale at public auction, in order to ascertain whether it had any value; and this was done without stating that the leasehold estate belonged to them; and afterward, in accordance with the advertisement, the lease was put up for sale, but no bidder appearing the estate was not sold; and it was held that the assignees might thus experiment in order to ascertain whether the lease had any value, without committing themselves to an acceptance of the lease. But the court

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strongly intimate that if a bidder had appeared and the premises had been sold, the assignees would have been holden to an acceptance of the assignment.

In *Hastings v. Wilson* (1 Holt N. P. C., 290), the assignees put up the premises at public auction, and there was a purchaser, and a deposit paid, but the contract of sale went off without the assignees showing why they did not enforce the sale. It was held that the assignees were liable.

In *Welsh v. Myers*, (4 Camp., 368), the bankrupt was lessee of pasture land, and the assignee suffered his cows to remain on the land for two days, and ordered them to be milked there. Lord Ellenborough was of the opinion that this was an adoption of the lease by the assignee.

So, intermeddling with the farm land of the bankrupt has been held sufficient to establish an acceptance by the assignee. (*Thomas v. Pemberton*, 7 Taunt., 206.) So also carrying on business upon the premises. (*Clarke v. Hume*, 1 Ry. & Mood., 207.) These cases, and many more which might be cited, seem to go as far as the defendant requested the court to go in this case.

A new trial is advised.

In this opinion the other judges concurred.

UNITED STATES DISTRICT COURT.—CONNECTICUT.

FEBRUARY, 1878.

A discharge by virtue of compliance with the terms of a composition in bankruptcy is a discharge by operation of law, even as against an assenting creditor, and an indebtedness thus discharged is a sufficient consideration for a new and express promise to pay the original debt.

Where a debtor who had been discharged under composition proceedings in bankruptcy, gave to one of his creditors who had signed the resolution a new note for his old debt, and afterwards again went into bankruptcy, *Held*, That the claim so revived should not be postponed to those of the new creditors.

Under Section 4972 the District Court has power only to marshal assets according to priorities and rights which have been created or established by

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the act itself, or have been created by liens placed upon the assets by the act of one of the parties, or by operation of law, and has no power to discriminate between different classes of debts of the same legal character.

In re MATTHEW M. MERRIMAN'S ESTATE.

APPEAL from a Register in Bankruptcy. Application of the assignee of the estate of Matthew M. Merriman, bankrupt, to have the proof of a claim by the American National Bank expunged. The case is fully stated in the opinion.

J. Hooker and *A. D. Smith*, for the assignee.

H. C. Robinson, and *C. E. Gross*, for the bank.

SHIPMAN, J.—Matthew M. Merriman had been duly adjudicated a bankrupt by decree of this court, prior to August 17th, 1875, and his estate was then in settlement. On that day, upon his application, an order was passed directing a meeting of his creditors to be held on August 30th, 1875, to ascertain if they would resolve to accept a composition to be proposed by him in satisfaction of their respective debts. At said meeting he presented a proposition to pay, in full satisfaction and discharge of their respective claims, twenty-five per centum thereof, which payment was to be secured by his four equal promissory notes, endorsed by Joseph Merriman, to be dated on the day of the final confirmation of the resolution by the court, and payable in three, six, nine, and twelve months from the date thereof, with interest. The American National Bank had duly proved against the estate of said bankrupt his notes to the amount of four thousand four hundred dollars, indorsed by Joseph Merriman. Said resolution was passed at said meeting by the requisite majority in number and value of the creditors assembled at such meeting, and was confirmed by the signatures thereto of the debtor and of the requisite creditors in number and value. The American National Bank, by their duly constituted attorney, expressly accepted said proposition at the first meeting of creditors, and expressed said acceptance by their signature. At the second meeting of credi-

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tors, held on September 11th, 1875, the resolution was found by the court to be for the best interest of all concerned, and was ordered to be recorded.

On November 27th, 1875, M. M. Merriman gave said bank his three notes, amounting in all to four thousand four hundred dollars, indorsed by Joseph Merriman, in renewal of the pre-existing notes which were due to said bank, paid the discount due thereon, and continued to renew said notes, making from time to time partial payments on the renewals, and paying the discounts thereon, until December 8th, 1876, when there was due upon the last renewals three thousand one hundred and eighty-five dollars, which sum with interest thereon is still unpaid. Joseph Merriman has continued to be the indorser upon each set of renewals. The bank received in one year after September 11th, 1875, either in reduction of the notes, or by way of interest, more than the amount which was payable by M. M. Merriman by the terms of the composition, but did not receive the same as a payment on the composition. No notes in accordance with the resolution were ever given to or demanded by said bank, but the giving of said notes were waived by the bank. Joseph Merriman's indorsement made the original notes and the renewals secure.

It was not claimed by the assignee that said bank assented to or signed said resolution under any promise or expectation that the debt of four thousand four hundred dollars was to be paid by the bankrupt. Fraud on the part of either party to the composition was not claimed.

M. M. Merriman was again adjudicated a bankrupt by decree of this court on February 16th, 1877, and John Hooker, Esq., was subsequently appointed assignee of his estate. Said bank has proved against said estate the last renewal notes, amounting to three thousand one hundred and eighty-five dollars. The assignee objects to the allowance of this claim upon the ground that the notes are without consideration, and that the debt which they represent has been legally discharged.

All the questions of law which arise upon the foregoing facts were discussed by counsel, the principal question being,

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whether an express promise made by a bankrupt to a creditor to pay the amount of his debt is valid, such creditor having theretofore expressly assented to a composition made and confirmed under the 17th Section of the Amended Bankrupt Act of June 22, 1874, and such composition having been substantially carried into effect, and exact compliance with its terms having been waived by the creditor.

An express promise by a debtor to pay a debt which had been, previously to such promise, barred by some positive statute, or had been discharged by operation of law, is binding upon the promisor. (*Cook v. Bradley*, 7 Conn., 57; *Stafford v. Bacon*, 1 Hill, 532.) In such cases the moral obligation to make payment, although the debt has been legally discharged, is a sufficient consideration for a new and express promise. In order to revive a debt which had been discharged by bankruptcy or insolvency proceedings, the new promise must be clear, distinct and unequivocal. (*Allen v. Ferguson*, 9 N. B. R., 481, 18 Wall., 1.)

A promise to pay a debt which has been voluntarily discharged by the creditor, as by accord and satisfaction, is not legally binding. Performance of an agreement of composition *inter partes*, in accordance with the terms of the agreement, or legal tender of performance of such agreement in accordance with its terms, is a discharge of the debt which has been agreed to be compromised, so that the discharged debt cannot legally be revived. An agreement of composition *inter partes* becomes an executed agreement by full payment on the composition, though not in accordance with the terms of the agreement, provided compliance with the terms is waived by the creditor.

I forbear to consider the question whether the payment within the year to the bank of an amount of money equal to the twenty-five per cent. and interest, which was payable by the resolution, is a satisfaction of the agreement, the money not having been paid to or received by the bank upon the composition, but upon the antecedent debt, and shall assume that, before the last renewal notes were given, the debtor had been

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legally discharged by his compliance with the terms of the resolution, legal compliance having been waived by the creditor.

The question which was first suggested resolves itself into this—Is a discharge, by performance of the terms of a bankruptcy composition, a discharge by operation of law, or is it a voluntary discharge from the debt which was due to a creditor who had expressly assented to the resolution of composition?

The resolution to accept a composition, and the proceedings which result in an assent by the requisite number of creditors, and in the recording of the resolution by order of court, are proceedings in bankruptcy. They are a method of dividing the estate of the bankrupt among his creditors under the control of a Court of Bankruptcy. Payment under a composition is one mode of distribution; payment of dividends by an assignee is another mode. Theoretically, each mode divides the whole estate.

A discharge by virtue of payment of the amount specified in the resolution of composition is confessedly a compulsory discharge as to the non-assenting creditor. The discharge is in a certain sense a voluntary act of an assenting creditor, because it is in his power to give or withhold his assent. Assent is a matter of his own election, and if the requisite number of creditors do not assent, the resolution has no effect. But the discharge is also by operation of law as to the assenting creditor, because the entire proceeding is a part of bankruptcy proceedings instituted under authority of a court, and this particular method of division of the bankrupt assets has no validity unless the court is satisfied that the proposition is for the interest of the creditors. The assent of the creditors is a means of ascertaining the fairness and propriety of the proposed division.

The proceeding is not a composition *inter partes*, in which proceeding each creditor can make his assent or dissent final as to himself, but is a statutory composition wherein the assent only of a specified number is required, subject to a subsequent decree of court. The composition is as to the assenting credi-

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tor both a voluntary act and an act of the law, but its efficiency is derived from the compulsory power of the law. The differences are radical between the nature of a composition *inter partes* and of a bankruptcy composition; the root of their differences is the fact that the entire proceedings for and in a bankruptcy composition are proceedings in bankruptcy, and are a part of a system for the compulsory division of assets which is administered by a court, while a composition *inter partes* derives its validity merely from the will of the parties. These differences induced the Supreme Court of Massachusetts to declare recently, that the proceedings for a composition under the statute "differ wholly in nature and effect from a voluntary composition which binds only those executing it." (*Guild v. Butler*, Oct., 1877, published in *The Reporter* of Jan. 2d, 1878.)

That a discharge by virtue of compliance with the terms of a bankruptcy composition is a discharge by operation of law, is indicated by the effect of such a discharge upon sureties or indorsers of the debtor under the corresponding section of the English Act of Bankruptcy.

Proceedings under the 126th Section of the English Bankruptcy Act of 1869 are substantially similar in character to proceedings under the section of our Bankrupt Act in regard to composition. A discharge of the principal debtor by virtue of an executed agreement *inter partes* is a discharge of his surety, unless such result is expressly avoided by the terms of the agreement of composition, but a discharge of the principal debtor by virtue of a composition under the 126th Section of the English Act is, after some hesitancy on the part of courts, and after a contrary decision, now clearly held not to be a discharge of the surety, although the creditor had expressly assented to the terms of the resolution. (*Ex parte Jacobs*, L. R. 10 Ch. App., 211, overruling *Wilson v. Lloyd*, L. R. 16 Eq., Cas., 60.)

In the case of *Megrath v. Gray* (L. R., 9 C. P., 216), the same result was reached. The Court of Common Pleas placed their decision upon the ground that it is a universal rule in

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Bankruptcy Law that the discharge of an insolvent debtor does not discharge his solvent co-debtor, and that this principle has always been recognized in English Bankruptcy Acts since the Declaratory Act in 10 Anne, and was again expressly incorporated in Section 50 of the Act of 1869, and that the discharge mentioned in Section 50 applies also to a discharge which may be obtained as a result of the proceedings under Section 126.

In *Ex parte Jacobs* the court took a somewhat broader view of the subject. It stated the question as follows: "There can be no doubt that, if the holder of a bill, by becoming party to a deed or agreement, independently of the Bankrupt Act, agrees to accept a composition from the acceptor, he thereby discharges the drawer; but, on the other hand, it is equally clear that if the acceptor is discharged from his liability by operation of law by becoming a bankrupt, the liability of the drawer to the holder is not thereby affected. We have now to consider whether the discharge of the acceptor under the 125th and 126th Sections of the Bankruptcy Acts of 1869, where the holder of the bill votes in favor of the liquidation or composition, is to be considered a discharge by the voluntary act of the holder, or a discharge by operation of law." The reasons which influenced the court were, first, that in a composition *inter partes* the discharge is the act of the creditor alone, whereas in a bankruptcy composition the proper majority have power to assent to the terms, whether the particular creditor chooses to attend or not, or chooses to vote or not; and, secondly, the injurious results of the doctrine that an assenting creditor was discharging his surety. "The consequences of holding that the holder could not vote without discharging the drawer would be, that in many cases a great number, and in some cases the majority, could not vote."

I have been pressed towards a conclusion that the discharge should be deemed to be the voluntary act of the assenting creditor, by the fear that the contrary doctrine would open a door to fraud, and that a bankrupt would be enabled to obtain easily the requisite majority of his creditors, and then, disre-

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garding forthwith the terms of the resolution, would give notes to the favored few, and thus revive his debts to the disadvantage of subsequent creditors, while he is also guilty of a breach of faith towards the unfavored majority. But a consideration of the character and nature of bankruptcy compositions leads to the conclusion that while this improper course of conduct is possible and practicable, it is one which is permitted by the present terms of the Bankrupt Act.

The assignee also claimed that the case showed that M. M. Merriman's estate was deeply insolvent, which was not denied, and that the bulk of the debts were incurred after the first bankruptcy for goods which went into the new business, that the bankrupt obtained credit upon the faith of his discharge by virtue of his composition and in the belief that his old debts were cancelled, and that the goods which were then sold form the bulk of the assets of the estate. From these facts the assignee insists that an equity has arisen that payment of a dividend upon the revived debts should be postponed until the new debts have been fully paid.

If the conclusions which have heretofore been indicated are correct, each class of debts is alike legally due, and no express lien in favor of any one class of creditors has attached to the fund in the hands of the assignee. Section 4972 declares that "the jurisdiction conferred upon the district courts as courts of bankruptcy shall extend * * * *Fourth.* To the adjustment of the various priorities and conflicting interests of all parties. *Fifth.* To the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors." I am of the opinion that these clauses confer upon the District Court power only to marshal assets according to priorities and rights which have been created or established by the act itself, or have been created by liens which have been placed upon the assets by the act of one of the parties or by operation of law, and that it is not in the power of the court to discriminate between different classes of debts of the same legal character, although as matter of

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morals or of honor one class of debts should not have been incurred.

The application to expunge the claim of the bank is denied.

UNITED STATES DISTRICT COURT—N. D. ILLINOIS.

So long as there are undistributed partnership assets and partnership debts or liabilities, the firm may be adjudicated bankrupt.

As between himself and the firm creditors, one member of a firm cannot estop himself by any dealings with his partner from any duty he owes these creditors.

A firm in which one G. was a partner having expired by limitation, the interests of the other partners were transferred to him by bills of sale, and at the same time he entered into an agreement to faithfully apply the firm assets to the payment of the firm debts. He afterwards filed a voluntary petition in bankruptcy and included the firm assets and debts in his schedule. *Held*, That the other members of the firm had a right to intervene and have the firm adjudicated, to the end that the firm assets might be applied to the payment of the firm debts.

In re SELDEN H. GORHAM.

THE facts appear fully in the opinion.

BLODGETT, J.—This case comes up upon the petition of Hollister to be made a party to the voluntary petition of Gorham to be adjudged a bankrupt. The facts, which are undisputed in the case, seem to be these: Hollister, Gorham and Dwight were partners from March, 1875, to March, 1878, under the firm name of Hollister & Gorham, and were engaged in the business of wholesale dealers in carpets, upholstery and furnishing goods in this city.

Hollister and Gorham were general partners, and Dwight a special partner, under the Illinois statute in regard to limited copartnership.

On the second of March, 1878, the partnership expired by limitation, and Dwight and Hollister, by bills of sale, transferred their interests in the partnership assets to Gorham. At the same time an agreement was made between Hollister and

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Gorham by which Gorham agreed to faithfully apply the firm assets to the payment of the firm debts; that the business should continue under the firm name of Hollister & Gorham, and that Hollister should be paid a salary of one hundred and fifty dollars per month from March 1st to July 1st, 1878, and also be entitled to three-eighths of the profits of the business, if any, from January 1st to July 1st, 1878.

On the first of January, 1878, the firm was unable to meet its liabilities as they then matured, and obtained an extension from a portion of its creditors on their then pressing liabilities, until March and April last. At the time Gorham took the transfer of the interest of Hollister & Dwight, the financial condition of the firm as to assets and liabilities remained about as in January, except so far as relieved by the temporary extension to March and April. After Gorham took the bill of sale he made purchases for the business in the firm name of Hollister & Gorham, to the extent of about nine thousand dollars, and paid from the sales of the stock and collections about the same amount of indebtedness of the old firm. On the 29th of April Gorham made a voluntary assignment for the benefit of creditors to George F. Phelps, but nothing seems to have been consummated under it, and no particular steps were taken to carry the assignment into effect.

On the 4th of May, Gorham filed his voluntary petition in bankruptcy in this court, scheduled the assets of the firm of Hollister & Gorham, or rather the assets which he had received from Hollister & Dwight, as the firm assets, about fifty-seven thousand dollars, and liabilities about seventy-three thousand dollars, which included his liabilities as a member of the firm of Hollister & Gorham and about two thousand eight hundred dollars due to one Charles P. Thayer. On the 18th of May, Gorham amended his schedule and added about six thousand dollars of the assets, and an individual liability to his father, C. P. Gorham, of six thousand dollars.

On the 22d day of May, Gorham filed a petition for composition, and offered to pay his creditors 30 per cent. on their demands. This offer was rejected by the creditors at a credi-

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tors' meeting, and on the 6th of July, C. P. Gorham, the father of the bankrupt, filed proof of debt for thirty-one thousand five hundred and twenty-seven dollars against the bankrupt individually, although the bankrupt in his schedule in bankruptcy, and in his composition schedule, had only put his father down as a creditor to the amount of six thousand dollars. On the 18th of July, Hollister filed a petition, setting forth in substance the existence of the partnership up to March 2d; that Hollister then retired from the firm, leaving assets in the hands of Gorham, with the agreement that they should be applied to the payment of the copartnership debts; that the copartnership debts amounted on the 1st of March to over sixty-six thousand dollars, all or nearly all of which remained unpaid; that Gorham, by his proceedings in bankruptcy, was seeking to apply the firm assets to the payment of his individual liabilities, to the prejudice of the firm creditors, and asked that he might be made a party to the bankruptcy proceedings, and that the firm might be adjudicated bankrupt to the end that the firm assets should be applied to the payment of the firm debts. To this petition the bankrupt, Seldon H. Gorham, objects, and objection is also made by and in behalf of the individual creditor of the bankrupt, Mr. C. P. Gorham.

The petitions and objections were referred to the register to hear proofs and report, and he has reported against allowing the prayer of the petition. Exceptions are taken to the finding on this report.

On the 15th of August, Hollister filed a petition in the name of the firm, asking that the firm be adjudicated bankrupts, and that a rule be made on Gorham to show cause why such prayer should not be granted. On the same day, W. W. Phelps, assignee of Gorham in bankruptcy, filed a supplemental petition in the case of H. Seldon Gorham, asking that Hollister be made a party, and the firm adjudicated, so as to enable him to reach partnership assets, and properly distribute the assets among the individual and partnership creditors.

On the 31st of August, certain firm creditors filed an involuntary petition in bankruptcy against Hollister & Gorham,

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alleging acts of bankruptcy, and asking for the adjudication of the firm.

The bankrupt resists the petition filed by Hollister in behalf of the firm, and by the assignee, but no objections are urged by him against the involuntary petition.

The questions raised have been ably and exhaustively argued and discussed, the discussion being mainly directed to the effect of allowing Hollister to become a party on a distribution of the assets between the individual and the firm creditors. It may be assumed that several of the petitions have been filed out of abundance of caution, as the repeal of the Bankrupt Law was about to take effect, and in order that an adjudication might be secured in some one of the forms asked for.

The only question I propose to definitely dispose of this morning is the right of Hollister to become a party to the bankruptcy proceedings, and have the firm adjudicated, either on his own petition or on that of the assignee.

Whatever may have been held in other circuits, the rule in this circuit has been uniform that so long as there are undistributed partnership assets and partnership debts or liabilities, the firm may be adjudicated bankrupt.

The authorities directly in support of this are, *In re Noonan*, 10 N. B. R., 331, 3 Biss., 491; *In re Cook & Gleason*, 3 Biss., 116.

The same rule is well settled in other circuits, as will be seen by reference to *Hunt v. Pooke*, 5 N. B. R., 161; *In re Independent Insurance Company*, 6 N. B. R., 260; *In re Greenpond Railroad Company*, 13 N. B. R., 118; *In re McFarland*, 10 N. B. R., 381.

There can be no doubt, in the light of these authorities, that Gorham, at the time he filed his petition, could have asked to have the firm adjudged bankrupt; that is, at the time he filed his voluntary petition in bankruptcy, on the 4th of May, 1878, and on the filing of such petition a rule would have been entered requiring Hollister to show cause why adjudication should not be entered against him and against the firm.

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This is clearly shown by the general orders in bankruptcy, which have been the rule of all the Bankrupt Courts since the Bankrupt Law went into effect, in June, 1867. Rule 18 reads as follows :

“ In case one or more members of a copartnership refuse to join in a petition to have the firm declared bankrupt, the parties refusing shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the copartnership is not insolvent or has not committed an act of bankruptcy; and to take all other defences which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such copartner shall be required to furnish to the marshal, as messenger, a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made.” And on the return of this rule, no act of bankruptcy need be proven. It is sufficient if it be shown that the firm owed more than three hundred dollars, and is unable to pay its debts in full.

This was held by Judge Drummond in the case *In re Noonan*, above cited. So, too, the creditors of the firm could have filed an involuntary petition against both members, and had the firm adjudicated if an act of bankruptcy could have been alleged against the firm and proven.

With these rights on the part of Gorham, or of the firm creditors, to bring Hollister and the firm into bankruptcy, I can see no escape from the conclusion that Hollister had a corresponding right to have the firm adjudicated. It seems very clear to me that his right was co-extensive with that of Gorham, or co-extensive with that of the creditors of the firm, and that if Gorham or the creditors could have required the firm

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to be adjudicated, then Hollister can ask to be made a party to the adjudication which Gorham has already obtained. His liability on the partnership debts was not extinguished, and he therefore had the right to invoke the aid of the court, both for the purpose of obtaining his own discharge, and also to protect the firm creditors.

What valid reason, then, can be urged against his right to intervene in the petition filed by Gorham? Gorham's neglect or refusal to join him in the proceedings cannot defeat his right, and when he makes known to the court by his petition sufficient facts to show that he ought to have been joined in the proceeding by which Gorham attempted to bring the co-partnership assets and creditors before the court, it seems to me he has made out a right to become a party to those proceedings. He seems to me to have been a necessary party to the proceeding in order to enable the court to make a proper order for the distribution of assets between the firm and the individual creditors, and it is not proper for the court to allow a mere question of form or the manner in which he seeks thus to be made a party to interfere with the substantial rights of Hollister, or of the creditors.

It is urged, however, with much earnestness, that there are no partnership assets; that by the sale the assets of the firm became the individual property of Gorham, and that Hollister has estopped himself from saying that there are partnership assets, and from asserting that he is thereby entitled to become a party to these proceedings.

Two answers to this position occur to me; first, that as between himself and the firm creditors, Hollister cannot estop himself by any dealings with Gorham from any duty he owes these creditors. By the bankrupt law Hollister is bound, and it is made his duty, to see that the partnership assets are properly applied to the payment of the partnership debts, and no dealing between himself and Gorham can estop him from exercising that duty.—Secondly: That by the express written agreement between Gorham and Hollister, the assets are pledged to the payment of the debts of the firm, and Gorham is only

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made a trustee for the benefit of the creditors, to convert the assets and pay the debts of the firm, and that at any time it is competent for either of these copartners to bring these firm assets into the bankrupt court, for the purpose of having them distributed, in accordance with the bankrupt law, to the various creditors who are entitled to them.

Without further discussing the matter, then, I am of opinion that the register erred in holding that Hollister could not file this petition, and the exceptions to his finding in that regard are sustained, and an order should be made upon the petition and proofs, allowing Hollister to become a party to the petition in bankruptcy filed by Gorham, and that Hollister, and the firm of Hollister & Gorham, should be adjudged bankrupts on their own petition.

No order will be made for the present in regard to the other petitions that have been filed.

It was urged on the hearing, that I should decide the ultimate question involved in this discussion, which is the application of the proceeds in the hands of the Bankrupt Court to the payment of the individual and the copartnership debts; but it seems to me that a decision at this time would be premature, as it would bind nobody, as there is, properly speaking, no question before the court to which that opinion could be made to apply, and error could not be assigned to any finding which I might now make as to the proper distribution of the copartnership assets. That will come up hereafter; but I am clearly of opinion, that the right of Hollister to be made a party to these proceedings must be conceded; and while the register seemed to be of the opinion that the proper form of proceeding was for Hollister to have filed an original petition asking for an adjudication of the firm, and asking that Gorham should show cause as a recalcitrant, or objecting member of the firm, why the firm should not be adjudicated; yet I can see no reason why that mere form, when it only reaches the same terminus after all, should be insisted upon in this case. It seems to me that Gorham being in bankruptcy, having brought the firm assets and the firm creditors into the Bankrupt Court, it was

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the right of Hollister to be made a party to the proceedings which Gorham had initiated.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

SEPTEMBER 18, 1878.

It is not competent for a creditor and the bankrupt to submit to arbitration the question of the amount due to the creditor from the bankrupt's estate.

The Code of New York has no application to bankruptcy proceedings.

A submission of a claim by stipulation to the register to hear and determine is not in the nature of an arbitration or a reference under the New York Code, and the decision of the register in such case is not final or conclusive, but is subject to the review of the court.

The holder and owner of a claim can alone make the proof.

A note which is subject to an offset for a larger amount is not a provable debt.

The claim of one of the creditors, J. W., was upon two notes, which, with others, had been given by the bankrupts to the firm, W. & H., for a debt due to the firm, secured by a pledge of stock. The firm afterwards surrendered to the bankrupts a large number of notes, and signed an agreement to take up and surrender others, including the ones in question, and received from the bankrupts a cash payment, which, it was agreed, with the stock held by them, should be taken in satisfaction of the debt. The claimant became the indorsee of the notes after their maturity and dishonor. *Held*, That the notes were paid.

In re JOHN B. FORD & CO.

THE facts appear fully in the opinion.

T. Saunders, for bankrupts.

E. F. Brown, for creditors.

CHOATE, J.—This case comes up on the certificate of the register of proceedings taken before him for the re-examination of claims of two alleged creditors of the bankrupts, and has been argued as a motion to expunge the proofs of debts, which were allowed by the register.

The application for re-examination was made by the bankrupts. pending proceedings for a composition. The case is not

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therefore strictly within General Order No. 34, which regulates re-examinations of claims on motion of an assignee or a creditor. After the testimony was taken before the register, the attorneys for the bankrupts and the alleged creditors whose claims were in dispute, entered into a stipulation in writing referring the matter to the register to hear and determine.

As originally drawn the stipulation contained the word "finally," but at the suggestion of the bankrupt's attorney the word "finally" was stricken out. It is now claimed by the creditors that the decision of the register is final and conclusive, either on the ground that the submission was in the nature of an arbitration or on the ground that it was a reference under the New York Code to hear and determine, and that the decision of the referee is final because exceptions have not been filed within the time limited by the Code.

Neither position is well taken. It is not competent for a creditor and the bankrupt to submit to arbitration the question of the amount due to the creditor from the estate of the bankrupt. That is not one of the methods appointed by the Bankrupt Law for ascertaining the claims upon the estate. Such an agreement would seriously affect the rights of other creditors, and they have a right to have all creditors' claims determined in the mode appointed by law. Nor does the stipulation purport to be a submission to arbitration. It seems to have been resorted to as a convenient mode of declaring the testimony closed, and of submitting the questions arising on the testimony to the register, and there is nothing to show that either party intended that in passing on those questions the register should exercise any other than his ordinary powers in similar cases. The Code of New York has no application to bankruptcy proceedings, and there is nothing in the stipulation to show that the parties intended to make its provisions applicable to this case, even if it was competent for them to do so. The decision of the register is therefore subject to the review of this court.

The claim of one of the creditors, Joseph Warren, is on two

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promissory notes given by the bankrupts to Warren & Howard for value, and Joseph Warren became the indorsee thereof after their maturity and dishonor. They are therefore subject to the same defences as if held by Warren & Howard. In July, 1875, the bankrupts were indebted to the firm of Warren & Howard, mainly for goods sold and delivered, in about fourteen thousand five hundred dollars, for which Warren & Howard held the bankrupt's notes, in all about twelve thousand dollars, including the two notes now held by Joseph Warren—the balance of the debt was due on open account. As security for this debt, the bankrupts transferred to Warren & Howard thirteen shares of the capital stock of the Christian Union Publishing Co. On the 4th of January, 1876, Warren & Howard surrendered to the bankrupts a large number of the notes held by them, and signed an agreement to take up and surrender others, including the two now in question.

On the same day they received the bankrupts' checks for eleven hundred and fifty dollars.

There is some conflict of testimony as to the consideration for this agreement, but, upon all the evidence, I am satisfied that it was then agreed between the parties that the stock held by the creditors should be taken, together with the cash payment then made, in satisfaction of the debt.

This view of what took place, testified to by Mr. Ford, is far more consonant with the written evidence, and a far more probable account of the transaction than that given by Mr. Warren, according to which the stock still remained as security. Upon his statement of the matter I can see no occasion whatever for the surrender of the notes or the giving of the the agreement of January 4, 1876.

The notes held by Warren, therefore, must be treated as paid, and his claim must be expunged.

The claim of Warren & Howard is on three notes, one for one thousand six hundred and thirty dollars and forty-nine cents, and two for one thousand two hundred and ninety dollars and forty-three cents each.

As to the last named, it was shown by the testimony, and

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not disputed, that they belonged to another party to whom Warren & Howard had transferred them, and that there is an agreement between Warren & Howard and the holder that Warren & Howard should prove the debt and receive the dividend, and pay it to the holder.

The claimant must, in his deposition of proof, swear that the amount of his claim is justly due from the bankrupt to him. (Section 5077.)

It is obvious, therefore, that the holder and owner of the note can alone make the proof. And the proof made on these notes must be expunged.

As to the note of one thousand six hundred and thirty dollars and forty-nine cents, which appears not to have been included within the release of notes effected on the 4th of January, it is subject to an offset for a larger amount due to the bankrupts by the failure of Warren & Howard to take up and surrender other notes mentioned in the agreement of that date, and therefore the proof of this claim should also be expunged.

Ordered accordingly.

UNITED STATES DISTRICT COURT.—S. D. NEW YORK.

MAY 30, 1878.

The bankrupts, prior to the filing of their voluntary petition, paid their attorneys one hundred and fifty dollars, and assigned to them a large amount of uncollected claims, to secure them, as alleged, for services rendered and to be rendered in the bankruptcy proceedings. Some of these claims were afterward collected by the attorneys. An action was commenced against them by the assignee to recover back the moneys paid and the property assigned, on the ground that the same were illegal, fraudulent, and void under the Bankrupt Law. On an application made by the assignee after issue joined, to compound the claim by accepting from the attorneys the claims still uncollected, and releasing them from all claims on those which they had collected, *Held*, That the case was not a proper one for the compounding of disputed claims under Gen. Order No. 20.

The expense and delay of a litigation, though considerable, does not justify a compromise in a case where public interests and the due administration

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of the Bankrupt Law require the settlement of the questions of law involved by the judgment of the court.

*In re DANIEL C. ROWE, SUMNER BABCOCK and
WILLIAM W. POST.*

THE facts appear fully in the opinion.

CHOATE, J.—This is an application to the court, on the part of the assignee, to compound a claim against the estate under General Order No. 20. The register to whom the matter was referred to take proofs, and report the same with his opinion, recommends that the agreement for the compounding of the claim made by the assignee, subject to the approval of the court, be approved.

I entirely disagree with this conclusion of the register. The case is as follows: A voluntary petition was filed by two of three partners on the 6th of October, 1876, and they were adjudicated bankrupts October 14, 1876. On the 2d of October, 1876, the bankrupts paid to their attorneys one hundred and fifty dollars in money, and assigned to them about four thousand four hundred dollars in uncollected claims due the bankrupts, in consideration, as alleged by the said attorneys, that they should institute and carry on this very case in bankruptcy, and to secure them for services rendered, and to be rendered in protecting the bankrupt and their creditors from the losses then impending and likely to happen from sale under execution at a great sacrifice of a large part of the property of the estate. The one hundred and fifty dollars was treated as a retainer, and assignment of the choses in action as collateral security for the proper charges of the attorneys for services and for their disbursements incurred, or to be incurred by them in and about the business, including the compensation of other counsel to be retained. The assignee was appointed December 6, 1876.

On the 8th of June 1877, the assignee commenced a suit in equity against said attorneys to recover the said money paid

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and property assigned, on the ground that the same were illegal and fraudulent and void under the Bankrupt Law.

On the 13th of July, 1877, the said attorneys filed their answer to the bill of complaint, admitting the receipt of the money and the execution of the assignment, but denying that the same were illegal or in violation of the provisions of the Bankrupt Law, and setting forth with some detail the services rendered, and the expenses incurred by them in and about said business, both before and after the filing of the petition in bankruptcy.

It is claimed by the attorneys that those services were highly beneficial to the creditors in their results. For the purposes of this motion I do not call this in question.

It also appears by the averments in the answer and otherwise that a proper charge for the services of the attorneys in all the matters claimed by them to have come within the agreement under which the money was paid, and the assignment made, would be at least one thousand dollars, that they claimed to have paid out in necessary expenses one thousand and eighty-one dollars, and ninety-seven cents, that they have been retained specially by the assignee to defend actions brought against him to recover property in the bankrupts' possession at the time of the assignment, for which they claim as counsel fees two hundred and fifty dollars, that of the claims assigned to them they have collected one thousand eight hundred and nine dollars and thirty four cents, leaving uncollected about two thousand six hundred dollars.

The compromise negotiated between the assignee and the said attorneys, is that they shall reassign to him the uncollected claims, and that he shall release them from all claims on those which they have collected, the result of which is claimed to be that the attorneys will realize above their disbursements one hundred and twenty-seven dollars and thirty-seven cents in full for all their claims against the estate.

The grounds on which I decline to approve this compromise are these :

1. The case is not in its character a proper one for the

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compounding of disputed claims under General Order No. 20.

The claim made by the attorneys in their answer raises a question of law of great importance in the administration of the bankrupt law, to wit: the right of the bankrupt on the eve of his bankruptcy to withdraw a considerable part of his estate from the jurisdiction of the court, to secure his attorneys for their fees and charges in proceedings before and after the filing of the petition.

Assuming that there is some pretence of validity in the claim, it must still be treated as a doubtful one, and in view of the close relations subsisting between the bankrupt and the attorneys, and the relation of the attorneys to this court as its officers, I think that the use of any doubt there may be about this claim of the attorneys as matter of law, as the basis for compounding such claims when asserted in this form, would be productive of great abuses and scandals.

Virtually it would allow the bankrupt and his attorneys, under color of a claim of right not yet established, to take into their hands for their own use a part of the estate, and to secure, at any rate under the form of a compromise, some portion of the property thus withdrawn, to no part of which they may be in fact entitled. I think on grounds of public policy all such claims should be determined on their merits and according to law and not compromise.

2. The matters of fact put in issue by the answer are few in number and do not apparently involve the taking of much testimony. No reason or excuse is shown why the testimony has not been taken long ago. It is difficult to understand from the pleadings and the evidence before me, why the testimony should not have been taken within sixty days after issue joined.

The questions of law involved are such as it is important to have determined not only in this case, but as affecting other cases in which such claims may be made.

3. Although the compromise is approved by the register, by the assignee, and by the attorneys who are defendants in the suit, and by some of the creditors, yet the testimony taken,

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consisting mainly of the pleadings in the suit in equity and the agreement for a compromise, does not furnish the court the necessary information as to the character of the services rendered or the character and details of the expenses incurred by the attorneys, to enable the court to form an independent judgment as to the propriety of the compromise, if it were a suitable case for a compromise at all.

4. The principal reason given for the compromise is the great delay and expense involved in the regular determination of the questions by the prosecution of the suit, and the creditors apparently have acquiesced on that ground.

I think undue importance has been given to this consideration, partly no doubt from the fact that the assignee has neglected to prosecute his suit with diligence, and the expense and delay of the litigation, though considerable, ought not to justify a compromise in a case where public interests and the due administration of the Bankrupt Law require the settlement of the questions involved by the judgment of the court.

Let an order be entered setting aside the report of the register, denying the prayer of the petition, and directing the assignee to prosecute his suit with the utmost diligence.

UNITED STATES DISTRICT COURT—S. D. GEORGIA.

DECEMBER 2, 1878.

The moment a voluntary petition is filed, all the property of the bankrupt, in possession or in action, which is included in the inventory and schedules, comes into the prehensory power of the court as fully as if it was in the actual and visible presence of the court, and consequently is under its protection and within its exclusive control.

The bankrupt had given certain mortgages upon his exemption property, in each of which he had waived all his homestead and exemption rights under the State constitution and laws, and under the Bankrupt Act, in and to the property mortgaged, and also his right to a discharge in bankruptcy. The assignee appointed in the voluntary proceedings left the property in the hands of the bankrupt as custodian until he could procure the schedules and proceed to administer the estate. The mortgages were afterwards foreclosed, and the executions therefor levied on

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he mortgaged property, which had been returned in the schedules. The assignee never had actual possession of the property levied on. *Held*, That the waiver could not be enforced until the property was designated and allotted to the bankrupt by the assignee; that the levy was a positive contempt of the jurisdiction of the court, and was not justified by the ignorance of the mortgagees and the sheriff as to the bankruptcy of the mortgagor and the appointment of the assignee, as they might easily have obtained knowledge of these facts.

WILLIAM A. BYRD, Assignee, &c., of WILLIAM USRY, v. HARROLD, JOHNSON & CO., and J. W. MIZE, Sheriff.

THE facts appear fully in the opinion.

Mr. Hinton, for plaintiff.

Mr. Hawkins, for defendant.

ERSKINE, J.—The bill alleges that Usry was declared a bankrupt on the 24th September, 1878, and that the plaintiff was appointed his assignee on the 23d October, and a deed of assignment of the effects of the bankrupt was made to him on the same day; that he took possession of the estate, leaving the same in the hands of Usry, as his custodian, until he, the assignee, could procure the schedules and proceed to administer the estate; that Harrold, Johnson & Co., on the 25th of said October, foreclosed several mortgages against said bankrupt in Sumter Superior Court, and caused the executions therefor to be levied on certain property, returned by the bankrupt in his schedules, by one Mize, sheriff of said county, and who is preparing and threatening to sell the property so levied on and seized by him; that all of said defendants had at the time full knowledge of the bankruptcy of Usry and of the appointment of plaintiff as his assignee, and that the defendants, by their said acts, have deprived plaintiff, as such assignee, of "power to set apart and assign to the bankrupt his homestead and exemption allowed by law."

He prayed an injunction against all the defendants to restrain them from selling under or proceeding further with said *fi. fas.*, and from making any other or further levies, or from otherwise interfering with the property of said bankrupt, and

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he also prayed that all of said defendants may be ordered to show cause why they should not be held in contempt for seizing said property, &c.

The court granted the prayers of the plaintiff.

The defendants appeared, by counsel, at this term of the court, and asked that the injunction be dissolved, and the *rule nisi* for contempt set aside. They put in answers and affidavits. The answers admit the truth of the material allegations in the bill, with some slight qualifications, unnecessary to mention, as they have; in writing, agreed on the fact as to the possession of the property when the levies were made, to wit: "That the assignee never had actual possession of said property so levied on, nor did he go on the plantation after his appointment, until after the levy thereon by the sheriff by virtue of the mortgage *fi. fas.*"

The plaintiff and the bankrupt state in their affidavits that the defendants, at the time the levy was made, knew of the bankruptcy of Usry, and the appointment of the plaintiff as such assignee.

The sheriff in his affidavit admits that when he made the levy he had heard of the bankruptcy of Usry, but did not know that Byrd had been appointed his assignee; and further, that Byrd was not in possession of the property at the time of the levy and seizure.

Accompanying the answers of the defendants was a paper put in as a demurrer to the jurisdiction of the court, which alleged, among other matters, that the property so levied on is exemption property of the bankrupt, and by a clause in each mortgage Usry had waived all his homestead and exemption rights under the State constitution and laws, and the Bankrupt Act, in and to the property mortgaged, and also to his right to a discharge in bankruptcy, and that, therefore, by reason of the mortgages on the property exempted by virtue of the provisions of the Bankrupt Law, and also by reason of the said several waivers, this property does not come into this court, nor pass to the assignee; but, on the contrary, he has no right to its custody or to administer it; "but his only duty," says the

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defendant's demurrer, "as assignee, concerning the exempted property of the bankrupt, is to designate the same, and leave the bankrupt and his creditors to litigate the matter between themselves; it is no concern of his."

The bankrupt, in his voluntary petition and schedules, has returned under oath this very property, and claims it as excepted from the operation of the Bankrupt Act by the limitation inserted in Section 5045 of the Revised Statutes United States.

The moment Usry filed his voluntary petition to be declared a bankrupt, all the property, in possession or in action, which he included in his inventory and schedules, came, by the effect of the Bankrupt Law, into the prehensory power of this court as fully as if it was in the actual and visible presence of the court; consequently it is under its protection and within its exclusive control. And this construction of the statute is well settled by numerous unshaken decisions of the Federal Courts. (*Buck v. Colbath*, 3 Wall., 334; *In re Henry Vogel*, 2 N. B. R., 427; *In re Enoch Steadman*, 8 N. B. R., 319; *Hutchings v. Muzzy Iron Works*, Id., 458; *Lamp Chimney Company v. Brass and Copper Company*, 1 Otto, 656.) This being so, any interference, by instituting suits in State tribunals to affect the property, or by levying on it, seizing it, or in anywise interfering with it by State court processes, except by permission of the Bankrupt Court, is a direct infraction of its authority, and violation of the law.

But suppose that, at the time of the levy and seizure, neither the sheriff nor any of the other defendants had actual knowledge of the bankruptcy of Usry and the appointment of the assignee, they could easily have obtained it, and their ignorance—if such was the case—cannot justify the levying of the mortgage executions. For when this court declared Usry a bankrupt, the judgment was in the nature of a decree *in rem* as to the *status* of the property returned to his voluntary petition, and was notice to all the world.

In assuming the right to foreclose the mortgages in the State court, and to seize the mortgaged property, the defend-

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ants endeavor to strengthen their argument by the supplemental theory that Usry had, in the mortgages, waived claim to the exemptions allowed to bankrupts by the State and Federal laws.

Now, a waiver may be said to be a relinquishment of a known claim or right; it is here in the nature of an obligatory intransitive covenant not to claim the particular mortgaged property, should the undertakings in the mortgages to pay the debt be broken. It was a personal privilege which Usry possessed prior to the filing of the voluntary petition, to fix the condition of his absolute or potential rights as he pleased, so that he did not invade the rights of third persons. The waiver appertained to this identical property, but it could not be enforced until it was designated and allotted to the bankrupt by the assignee, and when that was done and the report of the assignee was confirmed by the court, those to whom the waiver, under the State constitution and laws, was made, must, if citizens of this State, pursue Usry in the State forum to enforce it.

As already seen, it is admitted in the defendant's pleading that it is the duty of the assignee to designate the homestead and exemption property and leave the bankrupt and his creditors to litigate between themselves. This is substantially in accordance with the view expressed by Mr. Justice Bradley in *Re Bass*, (15 N. B. R., 453.) He says: "Nor does it make any difference that the homestead was not ascertained or set out in severalty until after the proceedings in bankruptcy were commenced, or until after the conveyance to the assignee was executed. Whenever properly claimed and designated, the exemption protects it, and the exception created by the Bankrupt Act relates back to the conveyance and limits its operation. . . . It was his [the assignee's] business to report to the court whether the property claimed as homestead was or was not within the limit of value which the laws of Georgia allow for that purpose," etc. And the same rule obtains in designating and reporting the articles allowed by the Acts of Congress to bankrupts. (See Section 5045, Revised Statutes U. S.; Rule xix., and Form No. 20.)

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Under the state of facts in the record before me, the question may here be asked: How could Byrd, the plaintiff in this bill, and assignee of Usry, the bankrupt, perform his official duties, as such assignee in bankruptcy—how could he value, designate, allot or set apart the exemption allowed by law to the bankrupt and his family, and report his actings in the premises to this court, when the property returned by the bankrupt in his schedules, and claimed by him as exempt—a part of which property might, nevertheless, on investigation, be found to be assets for distribution among his general creditors—had been previously seized and taken from the rightful possession of the assignee, or from the hands of Usry, the custodian; in a word, from the possession of this court?

Such conduct on the part of the defendants cannot be vindicated; it was a positive contempt of the jurisdiction of this court, and I so decide.

Therefore, it is ordered and decreed that said defendants, Harrold, Johnson & Co., and J. W. Mize, sheriff of said Sumter County, and every of them do, within ten days from the filing of the decree in this cause (which decree counsel will prepare and submit to the court) deliver to the said assignee the identical property, so seized and possessed as aforesaid by said defendants, and named, described, and enumerated in said bill of complaint; and if any of said property has been sold, or otherwise disposed of, or wasted, the full value thereof must be paid to the assignee within the period of time last mentioned. In default thereof the rule *nisi* will be made absolute, and attachments issue.

It is further decreed, that the motion to dissolve the injunction be, and it is hereby denied.

It is further ordered, that the defendants pay the costs of this proceeding, to be taxed by the Clerk.

In re Flanagan.

UNITED STATES DISTRICT COURT—CALIFORNIA.

NOVEMBER 15, 1878.

Before adjudication in an involuntary proceeding, a composition was proposed by the debtor which was accepted and confirmed but was subsequently set aside on account of the inability of the debtor to carry it into effect. After the petition to set the composition aside was filed, but before the order thereon was made, the debtor filed his voluntary petition and was duly adjudicated. *Held*, that the pendency of the first proceeding, no adjudication having been made therein, was no bar to the right of voluntary petition secured by the act to the debtor; that proceedings should be continued in the case in which an adjudication was made, and that the proceedings in the involuntary case should be stayed.

In re JOHN FLANAGAN.

THE facts appear fully in the opinion.

HOFFMAN, J.—On the 16th of May, 1878, a petition in involuntary bankruptcy was filed against John Flanagan by certain of his creditors, claiming to constitute one-fourth in number of all his creditors, and to represent one-third in value of his aggregate indebtedness. On this petition the usual order to show cause was issued, and on the same day a petition was presented by the debtor praying that a creditors' meeting be called to consider a composition proposed for their approval. The meeting was accordingly held, the composition was accepted by creditors to the requisite number and amount, and on the 1st of July the composition was duly confirmed by the court and further proceedings in bankruptcy stayed.

On the 28th of August, one Thomas Meany, a creditor of the alleged bankrupt, filed his petition praying that the composition be set aside. The ground of this application was, that the bankrupt had failed and refused to comply with its terms by depositing certain notes with the register for the benefit of his creditors.

The reason of this refusal was the fact that one King had, previously to the filing of the petition in bankruptcy, levied an attachment upon the whole stock in trade of the alleged bank-

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rupt, which attachment he refused to relinquish and accept the terms of the composition.

As no adjudication had been made—no assignee appointed nor assignment made by the register—the lien of the attaching creditor remained unaffected by the bankruptcy proceedings.

This petition was, after several continuances, finally brought to a hearing on the 24th of September, 1878, on which day an order setting aside the composition was made. Previously, however, to the making of this order, but subsequently to the filing of Meany's petition—viz., on the 31st of August—Flanagan filed his voluntary petition to be adjudged a bankrupt. The usual order of reference was made, and on the 23d of September he was adjudicated a bankrupt by the register. At the creditors' meeting, called by the register for the election of an assignee, King, the attaching creditor, appeared by his counsel, and objected to the proceedings, on the ground that the court had no jurisdiction in the premises by reason of the pendency of the proceedings under the involuntary petition; and that the same not having been dismissed, or otherwise terminated, the court would not permit or take cognizance of the proceedings under the voluntary petition.

The question thus presented was certified to the court, argued by counsel, and submitted for decision.

It is objected, on behalf of the bankrupt, that King, the attaching creditor, has no standing in court, not having proved his debt in either proceeding.

To this it is replied that proof of debt was not made in the present proceeding because the creditor, by so doing, might be deemed to have come in under it, and to have waived his right to object to it.

Technically, the objection of the bankrupt seems to be well taken; but the omission can be remedied, and the rights of the creditor preserved, by ordering him to make such proof, and reserving to him the right to make thereafter such objection to the proceedings as he may see fit.

In the view I take of the principal question, such an order is

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unnecessary, for I shall proceed to dispose of the application on its merits, and as if the attaching creditor were regularly in court.

The ground on which the court is urged to set aside the adjudication, and to dismiss the petition in the voluntary case, is that the whole proceeding is void for irregularity.

In support of this position, several cases are cited, and confidently relied on, by counsel. The first and most pointed of these is *In re Stewart* (3 N. B. R., 108).

In that case a petition had been filed against Stewart by his creditors, and he had, before the return day of the rule to show cause, by an endorsement upon the copy of the petition served upon him, admitted that all the allegations of the petition, except those of fraud, were true. He subsequently, and before the return day of the rule to show cause, filed his voluntary petition, and was adjudged a bankrupt.

No reason for this proceeding appears to have been given, and the attorneys for the attaching creditors moved that the two petitions be consolidated, or else that the adjudication on the second petition be set aside, and the case of the creditors held for trial.

In deciding this motion, Mr. J. Duval observes :

“It never was intended by the Bankrupt Act, and no correct rule of practice can tolerate it, that when a creditor has instituted proceedings to force his debtor into bankruptcy the latter should be allowed to become a bankrupt and be adjudicated as such on his own petition before a determination of the creditors’ petition. To permit such a practice might work a flagrant wrong upon the rights of the petitioning creditor.”

The adjudication under the voluntary petition was thereupon set aside, and the debtor was adjudged on the creditors’ petition. As a general rule of practice, the ruling of the learned judge in this case was very possibly correct. But it by no means follows that the right of the insolvent to avail himself of the benefit of the act is in all cases suspended by the filing of a petition against him, or that the court is without jurisdiction to entertain it if filed.

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Cases may easily be imagined where it may be indispensable to the interests of the other creditors and to the securing to the debtor the benefit of the act that he should file his voluntary petition. The creditors' petition may be abandoned before adjudication, or the allegation of the act of bankruptcy may be untrue, or the creditors may not be the holders of provable debts, or they may not constitute the statutory *quorum* of creditors. In these and the like cases it might be a great hardship upon the debtor to compel him either to admit allegations which he knows to be untrue, or else to be subjected to the delay and expense of contesting them, and in the meantime to have his right to the benefit of the act suspended and denied. At the termination of the proceedings, if the result be in his favor, his right to file his voluntary petition would of course revive. But it may then be too late to defeat attachments and preferences, and to secure the equal distribution of his assets among all his creditors. The principal object of the act would thus be defeated.

The next case cited is *In re Wierlarski* (4 N. B. R., 390).

In that case the bankrupt filed a voluntary petition in 1868, on which he was adjudicated, and an assignee appointed. In 1870 he filed a second petition. The same debts were set forth, and the same creditors named in both petitions.

Objection was made to the proceeding under the second petition, which objection the register held to be well taken.

The matter having been referred to the court, Mr. J. Blatchford said: "The register is correct; the clerk will enter an order staying proceedings in this matter until the further order of the court. *If any good reason exists for going on with this matter it may be shown to the court.*" This case, therefore, not only does not decide that the filing of the second petition was wholly nugatory and void, and that the court was without jurisdiction to entertain it, but it clearly intimates that the court would proceed in it if any good reason for doing so should be shown.

The next case, *In re Drisko* (13 N. B. R., 112), appears to have no application to the subject under consideration. It

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merely decides that a voluntary bankrupt, who has contracted new debts since the filing of a prior petition, may file a new petition in bankruptcy.

The next case, *In re Lacey Downs & Co.* (10 N. B. R., 477), also has no bearing upon the present inquiry.

It relates merely to the right of a creditor to intervene and prosecute to adjudication when the petitioning creditor fails to appear or proceed with the prosecution.

The above are all the cases cited by the counsel for the attaching creditor. It will be seen that only one of them lends any support to the position he seeks to maintain.

I have not been referred by the counsel for the bankrupt to any case where the point under consideration has been decided under the late Bankrupt Act. But a decision under the former act is cited, which, by the force of its reasoning and the great eminence of the judge by whom it was made, is entitled to the greatest consideration. I transcribe the whole of Judge Conkling's opinion :

"I can perceive no sufficient reason why the pendency of the creditors' petition, on which no decree of bankruptcy has yet been granted, should be considered a bar to the right of voluntary petition secured by the act to the debtor. The act contains no such limitation of this right. The debtor may have good reasons for wishing to exercise it, notwithstanding the prior prosecution of a petition *in invitum*. He may be apprehensive that it may be voluntarily abandoned, or he may know that the charges it makes against him are unfounded, and think proper to contest their truth, and thus defeat the petition. I cannot see that any injury can possibly be done to creditors by this practice, while in one respect it is advantageous by giving them the benefit of the petitioners' schedules of debts and property without expense." (*In re Canfield*, 1 N. Y. Leg. Obs., 234.)

These observations appear to me conclusive.

But it is urged that the Bankrupt Act directs that, where the court has refused to accept and confirm a composition, or has set it aside after confirmation, "the debtor shall be proceeded with as a bankrupt."

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It is contended that, under this provision, the debtor, after failure to effect a composition, or after it has been set aside by the court, is to be taken and deemed to be a bankrupt, even though no adjudication has been made against him. Whether it is supposed that a formal adjudication must in such a case be made, or whether he is to be considered and proceeded with as a bankrupt without such adjudication, I did not clearly understand at the hearing. But whichever course be adopted, it is claimed that the debtor is, under the circumstances stated, declared by law to be a bankrupt, and it is no longer open to the court to inquire into the truth of any of the allegations of the petition, either in respect to the *quorum* of creditors, the commission of the acts of bankruptcy alleged, or the existence of the debts alleged to be due to the petitioning creditors.

As a corollary to this proposition, it is urged that, inasmuch as the court is expressly commanded to proceed with the debtor as a bankrupt, that proceeding must be prosecuted, and no other proceeding founded on his voluntary petition can be entertained.

It does not appear that the construction of the above-cited provision of the Bankrupt Act, which this court is urged to adopt, has hitherto received any judicial sanction.

It seems to be favored, however, by Mr. Blumenstiel, as demanded by the language, and most nearly conforming to the English act from which it is modelled. (Blumenstiel's L. and Pr. in Bankruptcy, p. 464.)

But the correctness of this interpretation is open to serious question. If, upon the failure of a proposal of composition, the debtor is to be at once adjudicated a bankrupt, it must be because the proposal of the debtor for a composition is treated as an admission of the truth of all the allegations in the creditors' petition necessary to procure an adjudication. But can this proposal be so treated?

An honest debtor, against whom a petition has been filed, and who knows himself to be insolvent, may propose or attempt an arrangement with his creditors, although he has not committed any of the acts of bankruptcy (perhaps fraudulent) with

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which he is charged ; and although he knows that the necessary *quorum* of creditors have not united in the petition. His want of success in effecting the composition cannot surely be treated as an admission by him of the truth of allegations which he knows to be false. His proposal for a composition is an admission of his insolvency, and nothing else. Justice seems to demand that, after failing to effect it, it should still be open to him to contest the truth of the allegations upon which it is sought to procure his adjudication as an involuntary bankrupt.

But even if his proposal for a composition could be considered as an admission by him to the extent supposed, it could have no greater effect than his written admission of the truth of the allegations.

The provisions of the act which require that creditors to a specified proportionate number and amount shall join in the petition, were not intended solely for the protection of the debtor.

Even when he has signed a written admission that the requisite *quorum* has united in the petition, the court must still "be satisfied that the admission is made in good faith." If it should subsequently appear that it was the result of collusion and fraud, the adjudication may be set aside. (*In re Duncan*, 14 N. B. R., 18.)

The dissentient creditors have rights which the statute recognizes and the court will protect. And amongst them is the right to insist that if the debtor, contrary to their wishes and interests, is to be thrown into involuntary bankruptcy, it shall be done only under the conditions imposed by the law. The debtor's admission that those conditions exist is of no effect if the fact be otherwise. It results that even if the proposal for composition could be treated as an admission by the debtor of all the allegations of the petition, it could have no effect to conclude the inquiry as to whether the requisite *quorum* has joined, because his written admission of the fact, if it does not exist, would be equally nugatory.

For these reasons I am of opinion that the object and meaning of the clause in question were merely that the court, on

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the failure of the proceedings in composition, should resume the case at the point where its progress was suspended by the proceedings in composition, and that it should be thereafter conducted as if no proceedings had been taken. In other words, that the phrase, "he shall be proceeded with as a bankrupt," should be construed to mean that the case shall be proceeded with as a case in bankruptcy in conformity with the provisions of law. This would also seem to be the reasonable construction of the English act upon which, as Mr. Blumenstiel observes, our own is modeled.

The language of that act is: "If it appear to the court . . . that a composition, in consequence of legal difficulties, or for any cause, cannot proceed without injustice or undue delay . . . the court *may* adjudge the debtor a bankrupt, and proceedings may be had accordingly." That is, the court may so adjudge if a proper case for an adjudication be made out. If this construction of the clause in question be correct, the circumstance that an abortive attempt at composition has been made may be eliminated from this discussion, and the case becomes the simple one of a filing of a voluntary petition by a debtor against whom a petition *in invitum* has already been filed, but on which no adjudication has been made. It is evident that in such case proceedings in both suits cannot go on; and it is equally clear that proceedings should be continued in the case in which an adjudication has been made, and in which no questions can arise as to the concurrence of the requisite *quorum* of creditors, or the commission by the bankrupt of the acts of bankruptcy alleged. There will thus be secured to the bankrupt the benefit offered by the act, and to the creditors the equal distribution of the assets discharged of any attachments which are by the act declared to be dissolved.

The objection of the attaching creditor is overruled, and the register will proceed in the matter of the voluntary petition. The proceedings in the involuntary case will be stayed, unless the petitioning creditors should desire to move for its final dismissal.

The clerk will certify this decision to the register.

In re Purcell.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

DECEMBER 10, 1878.

The statute allows any composition which is satisfactory to the requisite majority of the creditors and which is for the best interests of all concerned. Nothing can be set-off under Section 5073 against the principal of a debt due a creditor, except a debt due from the creditor to the bankrupt.

Where the bankrupt had given a creditor his accommodation notes to an amount larger than the claim of such creditor, which were discounted and afterwards proved against the estate by the holders, *Held*, That an assignee would have the right to set-off the dividend paid upon the notes against the dividend due such creditor and recover from him the balance of the amount so paid, and the same equitable right obtains in the case of a composition.

At a first meeting in composition fifteen creditors were assembled, representing seventy thousand and eighty-three dollars and ninety-six cents. A composition of one per cent. was accepted by a vote of eight creditors, representing fifty-six thousand two hundred and seventeen dollars and fifty-two cents. One of those voting in the affirmative was the assignee of an insolvent firm, and voted upon a claim of four thousand one hundred and twenty-seven dollars and fifty-eight cents. The bankrupt had lent his accommodation notes, to the amount of ten thousand dollars, to the firm, who discounted them for their own use, and the notes were proved against the estate by the holders and constituted part of the debts represented at the meeting. *Held*, That the assignee had no interest in the composition and should not be regarded as a creditor who had any voice in its acceptance; that the composition was not approved by the requisite majority within the true meaning of the statute.

In re MICHAEL PURCELL.

THE facts appear fully in the opinion.

North, Ward & Wagstaff, for motion.

Creevy, Busbe & Clark, contra.

CHOATE, J.—This is an application for an order for a second meeting in composition.

The composition proposed is one per cent. on the dollar, payable within ten days after the confirmation of the composition.

1. It is objected, first, that a composition for one per cent. should not be allowed; that it is a merely nominal composition and a fraud upon the law. The statute, however, allows any composition which is satisfactory to the requisite majority of

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the creditors and which is for the best interests of all concerned. In this case the debtor's statement does not show assets enough to pay one per cent. on the debts.

The question whether the composition proposed is for the best interests of all concerned is one of the special subjects of inquiry at the second meeting, and in this case it is not so obviously against the interests of any class of creditors that the court should on this ground refuse to allow the creditors to pass on this question. Any objection on the part of any considerable class of creditors, made at the second meeting, to a composition which would relieve the debtor from ninety-nine per cent. of his debts, would doubtless receive the most careful consideration of the court, especially if there were any reasons to believe that the debtor could not receive his discharge in the regular course of proceedings.

2. A more serious question arises, whether, at the first meeting, the resolutions received the affirmative vote of one-half in number and three-fourths in value of the creditors assembled at the meeting. The register has reported that fifteen creditors were assembled, whose debts together amounted to seventy thousand and eighty-three dollars and ninety-six cents, and that of these eight voted for the resolutions, their debts being fifty-six thousand two hundred and seventeen dollars and fifty-two cents. Among the eight thus voting for the composition was one Frederick Lewis, the assignee of an insolvent firm of Bryce & Smith, who voted on his proof of debt, four thousand one hundred and twenty-seven dollars and fifty-eight cents, for money loaned and merchandise sold by Bryce & Smith to the bankrupt. It appeared, however, that, prior to the bankruptcy, the bankrupt had lent his notes without consideration to Bryce & Smith for an amount exceeding ten thousand dollars, which notes Bryce & Smith had procured to be discounted for their own benefit; and these notes, outstanding in the hands of third parties, for value and overdue, had been proved against the bankrupt, and constituted part of the sum total of seventy thousand and eighty-three dollars and ninety-six cents. The question is, should this debt due to Bryce & Smith be

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counted in computing the one-half of the creditors in number and three-fourths in value? It is insisted, on behalf of those seeking to uphold the composition, that the accommodation notes cannot be off-set against this debt due to Bryce & Smith, because it is not a case of mutual debts or mutual credits, which it is said can alone be off-set under Section 5073 of the Revised Statutes; that no obligation arises on the part of Bryce & Smith to pay the bankrupt from the mere fact that they have had and used his notes by way of accommodation; that when the bankrupt pays anything on the notes, then, and not till then, will Bryce & Smith become liable to pay him therefor; that up to the time of the bankruptcy nothing had been paid on the notes by the bankrupt, and that therefore there can be no set-off. The question, however, is not to be tested by Section 5073 alone. That section provides for the simple and common case of set-off, and nothing more. It does not provide for, nor do its terms exclude any other possible equities that may arise between this estate and a creditor. And it can hardly be denied that the ordinary rules of equity that apply between debtor and creditor are to be administered by the Bankrupt Court in the adjustment of claims against and in favor of the estate. As regards these notes, Bryce & Smith are the principal debtors, and the bankrupt is the surety. If, now, an assignee of the bankrupt's estate were appointed, and the estate were being wound up in bankruptcy, and the assets were sufficient to pay a dividend of one per cent., what would be the rights of the assignee in equity, by reason of his paying the one per cent. on these notes, which Bryce & Smith are primarily bound to pay? As assignee he would owe, out of the common fund, to Bryce & Smith forty-one dollars and twenty-seven cents, one per cent. on their debts; but he would be compelled to pay on their debts, on which the bankrupt was surety, one hundred dollars, being one per cent. on those debts. These obligations become due from the assignee at the same time and out of the same trust fund in his hands. Surely, upon the plainest principles of equity, he would have the right to apply the dividend coming to Bryce & Smith to the payment which he is compelled to

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make as their surety to other parties, the holders of these notes. Suppose the estate was not indebted to Bryce & Smith at all, but that Bryce & Smith, as now, had used the notes. Can there be any doubt whatever that the assignee, upon payment of the dividend on the notes, would be entitled to recover the amounts so paid of Bryce & Smith as money paid to their use? If he could not do so, he would not succeed to and take for the benefit of the creditors all the existing rights of the bankrupt; but it is evident that he does succeed to all those rights. If the equity to compel such reimbursement existed in the bankrupt, his bankruptcy cannot be any reason why Bryce & Smith should escape or be released from their obligations to reimburse their surety, who may pay their debt, to the extent to which it is so paid. The bankruptcy does not change the nature of their obligation to pay, nor should the creditors, who have succeeded to all the rights of the bankrupt, be in a worse position, in case they discharge his obligation as surety in whole or in part, than the bankrupt would be.

Now, it is true that if the bankrupt were not in bankruptcy he could not set-off any such payment made by him as surety, except against the whole amount due from him to the principal debtor. If he paid only one per cent. (in this case one hundred dollars), he could set-off as between himself and Bryce & Smith only against their claim of four thousand one hundred and twenty-seven dollars. But in bankruptcy, and as against the assignee, their rights are different.

By the bankruptcy their claim against the fund is not for the payment in full of their demand, but for the same proportion as other creditors receive—no more, no less. As such creditors, and in proportion to their claim as creditors, and not otherwise, they are entitled to share in the benefits of any remedy over which the assignee may have against the party for whose benefit the assignee has paid out money by reason of the bankrupt's obligation as surety.

The accident, that they happen to be such party, surely cannot enlarge their equity as creditors.

Again, the surety may always recover and have the benefit of

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any collateral securities or funds applicable to the payment of the debt, which may be placed by the principal debtor in the hands of the creditor. What possible reason is there, then, why he should not be allowed to apply to his reimbursement funds in his own hands belonging to the principal debtor? In fact, any dividend paid to the holders of these notes is to be regarded as money paid by the assignee for account of and at the request of Bryce & Smith. So far as such dividend goes, it is a payment of Bryce & Smith, and on their order, and to that extent it discharges the obligation of the assignee upon any dividend coming to them out of the bankrupt's estate. While, therefore, this may not be a case of mutual debts, it is a clear case for the equitable set-off of the dividends or recoupment by the assignee from funds in his hands belonging to the principal debtors for moneys paid out on their account. There is no ground for the claim that the dividend paid on the notes should be off-set against the principal of the debt due to Bryce & Smith, under Section 5073. Nothing can be off-set against that debt except a debt from Bryce & Smith to the bankrupt.

These dividends are not such a debt; they were not paid by the bankrupt. The payment of them constitutes no obligation on the part of Bryce & Smith at the time of the bankruptcy, and nothing can be set-off against a creditor's claim except a debt due the bankrupt. The obligation to repay the dividend on these notes paid by the assignee, first arises against Bryce & Smith and in favor of the assignee, and, when paid, they must be set-off, if against anything, against what *he*, as assignee, owes to them, which is a ratable proportion of the trust fund—that is, the equal dividend with all other creditors on their claim against the bankrupt. The question remains, whether the same principle of equitable recoupment would apply in favor of the bankrupt in case of a composition. There is no reason why it should not. A composition is to be regarded under the statute as substantially the distribution of the debtor's estate among his creditors, though effected in a different way, in a method theoretically more advantageous to both parties: to the debtor, by enabling him to continue in business without being stripped of

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everything; and to the creditors, by giving them the benefit of having the estate realized upon under the management of the bankrupt himself, instead of being sacrificed by being suddenly closed out by an assignee. A composition which is not, in effect, substantially a distribution of the bankrupt's estate among his creditors ought not to be approved. It should be regarded as not within the meaning and purpose of the act. This is not inconsistent with some margin being left for the debtor, as a consideration for his services in winding up the estate, and an equivalent for possible losses that would be likely to result from winding up the estate in the ordinary way. A stipulated dividend is substituted for the uncertain dividend which would be the actual result of liquidation. But there is nothing in the act which would justify any different rule, in adjusting the relative rights and claims of creditors and the bankrupt under a composition, from those which govern between the assignee and the creditors. This equity now under discussion would remain the same.

The bankrupt, in paying the composition on these notes, does so as surety for Bryce & Smith; and, at the very time of such obligation arising to pay such composition on the notes, in lieu of the entire amount, he becomes also under obligation to pay the composition to Bryce & Smith, the principal debtors, on their claim, in lieu of the entire amount thereof. To say that he still owes the whole of his debt to Bryce & Smith, and that, therefore, he can only off-set the dividends paid on the notes against that entire original debt, is as erroneous in this case as in the case of the assignee.

At the same instant that he becomes liable to pay the composition, and that only on the notes, he becomes also liable for the composition only on the debt due to Bryce & Smith.

To set-off the dividend only on the notes against the whole debt due Bryce & Smith, and pay the composition on the balance, would, in effect, give them by way of composition more than other creditors receive out of the estate. They would get the payment on the notes, which enures directly to their benefit, and also a dividend on their claim, very slightly reduced,

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which would obviously be unjust. They would have their obligation on the notes discharged out of the trust fund—that is, by the creditors as a whole, without reimbursing the money thus paid out for their account. Their equities as creditors, and their obligations as principal debtor for whom the bankrupt is surety, are precisely the same as in any other case of bankruptcy. It is the evident design of the statute that all bankrupts, and all persons proceeded against as bankrupts under the act, should be free to adopt and resort to this method of liquidating their estates, by means of a composition, if the creditors consent.

To hold that the same equitable principles which apply to the administration of estates in bankruptcy do not apply in cases of composition, would virtually be to deny the benefits of a composition to many debtors who are largely indebted as sureties, for if in case of a composition persons who could not share in the estate in bankruptcy can share in the composition, this would in many cases render it impossible for the debtor to offer as favorable terms in composition to his creditors generally as they would have without a composition.

There is therefore on this ground, as well as on those above stated, strong reason for applying the same equitable rules to a composition as to a strict distribution in bankruptcy. For these reasons, therefore, the debt due Lewis, as assignee of Bryce & Smith, ought not to have been counted. Instead of the bankrupt owing him anything in case the composition is accepted and confirmed, he will be indebted to the bankrupt for the balance of composition to be paid on the notes over that which would become due on his claim. Having no interest in the proposed composition, Lewis is not to be regarded as a creditor who has any voice in the acceptance of the composition. Or if technically he is a creditor, and as such may vote, yet a majority made by his vote is merely a formal and not a substantial compliance with the terms of the statute. He has not a common interest with the creditors in the composition, and no composition carried by his vote should be considered as approved by a majority of the creditors within the meaning of the statute. Omitting Lewis from the list of creditors, the

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whole number present at the first meeting was fourteen, and there were but seven creditors who voted in the affirmative.

On the ground, therefore, that the composition was not approved by the majority in number of the creditors within the true meaning of the statute, the order for the second meeting should be refused.

3. It is unnecessary to decide the third point made against the composition, that the resolutions provided that any creditors examining the debtor should pay the fees and expenses of such examination; as the statute secures the right of any creditor to ask questions of the debtor, and makes it his duty to answer them, it is not very obvious how the creditors asking such questions can be charged with the expense of doing so, the meeting being called by the debtor and for his benefit. But provisions are often made in composition resolutions beyond the power of the debtor and the creditors to stipulate for, and such provisions have been sometimes treated as not being of the substance of the composition, and so as not invalidating it.

As the second meeting is refused, the effect of this attempt to charge the examining creditors with these expenses becomes unimportant.

Motion denied.

UNITED STATES DISTRICT COURT—W. D. TENNESSEE

The register has power to make a valid adjudication in an involuntary case where the alleged bankrupt has made default.

In re C. H. De FORD.

THE facts appear in the opinion of the register.

L. and E. Lehman, att'ys for petitioning creditors.

OPINION OF REGISTER.

To the Hon. E. S. HAMMOND, Judge of said Court.

Julius Bamberger and others filed their compulsory petition in bankruptcy in this case July 1, 1878, on which day your

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Honor directed that the order to show cause issue; which petition and order are herewith referred.

The order was made returnable July 10, 1878, but subsequently, viz., July 3d, another order was made changing the return day to July 16, 1878. The order to show cause is on file returned duly executed.

On the 27th day of July, 1878, S. W. Hatchett, a register of this court, by order signed by him, adjudicated said C. H. De Ford a bankrupt, which order of adjudication is herewith referred. I am asked to certify to your Honor the question as to whether the register had the power to make a valid adjudication, this being a case of compulsory bankruptcy. By Section 4, of the Bankrupt Act it is enacted that registers shall have power to make adjudication of bankruptcy, "provided, however, that nothing in this section contained shall empower a register to commit for contempt or to hear a disputed adjudication."

Supreme Court Rule, No. 4, provides that "upon the filing of a petition in case of voluntary bankruptcy, or as soon as any adjudication of bankruptcy is made upon a petition filed in case of involuntary bankruptcy, the petition shall be referred to one of the registers in such manner as the District Court shall direct." While Section 4 of the Act seems to clearly imply that the register may make all uncontested adjudications, Rule 4 seems to imply with equal clearness that he can have no power in case of involuntary bankruptcy until after adjudication. But it must be observed that Rule 4 contemplates that a compulsory petition will necessarily be contested, which is far from being the case, and the Supreme Court clearly recognize this fact, and provide accordingly in framing the forms and orders for enforcing the provisions of the Act. At the foot of Form 60, they say: "If default be made by the debtor to appear pursuant to the order upon a creditor's petition, the subsequent order may be made by a register in bankruptcy."

Considering that this note is not only last in order of all the provisions on this point, but made with the attention of the Supreme Court directed particularly to the question now under

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discussion, it seems to me they could have had but one object, and that to free the question from doubt. The order of adjudication was directly before them, and they plainly provide that, in case of default by the debtor, that "order may be made by a register in bankruptcy." In this case the order of your Honor was a clear recognition of the sufficiency of the charges in the petition. If proved, they would establish a case of bankruptcy. A denial would raise a contest which only the District Judge could hear. Default was an admission that there was no defence, and that consequently he was a confessed bankrupt, and there could be no contest.

Clearly the District Judge could have made the adjudication at chambers, because of the default; and, for the same reason, if the Supreme Court Form 60 means anything, it is that there being default the "order may be made by a Register in Bankruptcy."

Such, too, has been the uniform practice of this court under the construction given by his Honor, Judge Trigg.

Respectfully submitted,

T. J. LATHAM,
Register in Bankruptcy.

HAMMOND, J.—I concur with the register in the foregoing opinion. Section 4998, Rev. Stat., is a clear grant of power to the register to make adjudications of bankruptcy in cases unopposed. There is no more of an anomaly in the exercise of such a power by that officer than in its exercise in any other matter in an involuntary case where there is no contest. General Order No. 4, and Form No. 60 with its Note 1, taken together, mean only that there shall be no reference in a *contested* case of involuntary bankruptcy until after adjudication. When the alleged bankrupt suffers a default, the court may refer the case to the register to enter the order of adjudication, because it appears that there is no opposition. As soon as a contest arises in any matter before the register, the act makes ample provision for its decision by the court. Rev. Stat., Sec. 5009.

My learned predecessor made a general order referring all

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involuntary cases, where default was made upon the order to show cause, to the register, and authorized him to make adjudication, it being then an uncontested matter. It was a convenient and necessary practice, as he was necessarily often absent at long intervals from each of the three Judicial Districts of which he had charge. I have no doubt of his power to make that order, and I shall not disturb it. The application to vacate the former order of adjudication is therefore denied.

The clerk will certify this opinion to the register.

UNITED STATES CIRCUIT COURT—E. D. MASSACHUSETTS.

OCTOBER 7, 1878.

Where the issue of shares of capital stock in a corporation, which is fraudulent in fact, appears formal and regular on its face, and the books of the corporation show that the shares are fully paid up, and there is nothing to put an innocent purchaser of such shares in open market upon inquiry, such purchaser cannot be held liable, but the remedy of the corporation is against the guilty perpetrators of the fraud in their individual capacity. 7 J. C. 787

The limitation in the Bankrupt Act, in relation to suits by and against assignees, applies to a suit in equity brought by the assignee of a bankrupt corporation to charge the shareholders for the unpaid amount of their shares; and the statute begins to run from the time the estate vested in him as assignee. 6 A. R. 483

FOREMAN, Assignee, etc., of the Central Coal Mining Co.
v. *BIGELOW et al.*

THE facts appear fully in the opinion.

CLIFFORD, J.—Fraud does not render a contract void, but voidable only at the option of the party defrauded, both at law and in equity, whether the fraud was committed by one of the contracting persons upon the other, or by both upon persons not parties to the transaction; the rule being that where the fraud was committed by one of the parties upon the other, the contract remains operative and in force until it is disaffirmed by the injured party. (Chitty on Cont. (10th ed.), 626; Ad-

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dison on Cont. (17th Ed.), 228; *Clough v. Railway, L. R.*, 7 Ex., 26; *Jones v. Carter*, 15 M. & W., 718; *Upton v. Englehart*, 3 Dillon, 496.)

Sufficient appears to show that the complainant is the assignee in bankruptcy of the Central Coal Mining Company, and that the respondents are the owners of certain shares in the capital stock of that company. Attempt is made by the bill of complaint to compel the respondents holding such shares to pay certain sums alleged to be due for the non-payment in full of the amount of the capital of the company represented by such shares. From the bill of complaint it also appears that the corporation was organized with a capital of four hundred thousand dollars, divided into shares of one hundred dollars each, and that certain persons named, five in number, none of whom are made respondents in the case, became the corporators and directors of the company, and that the whole amount of the original stock was issued to those five persons, of which three hundred and fifty-three thousand, seven hundred and ninety dollars in amount was issued in consideration of the conveyance to the corporation by the directors of certain coal lands, fraudulently valued at that sum as between themselves, though in fact the lands were worth only twenty or thirty per cent. of that amount, and that the remaining forty-six thousand, two hundred and ten dollars of the stock was issued to the directors without consideration. Corporate authority was subsequently given to the directors to issue the bonds of the company, secured by mortgage, in the sum of one hundred thousand dollars, and to increase the capital stock in that amount. New stock for one hundred thousand dollars was accordingly issued and given, under a vote of the company, to such persons as purchased said bonds at ninety per cent., without other consideration. The directors, pursuant to that vote, did increase the capital stock of the company one hundred thousand dollars, and did issue certificates of shares for the same and gave them away without consideration. Shares of the capital stock of the company in due form were held by the respondents in the amounts specified in the bill of complaint.

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Debts to a large amount were contracted by the corporation, and on the 4th of May, 1874, the corporation was adjudged bankrupt. Nor is it questioned that the complainant is the lawful assignee of the bankrupt's estate, having duly succeeded the person who was first appointed to that place. As such assignee, he, on the 26th of April, 1877, petitioned the proper bankrupt court for a call and assessment upon the capital stock of the company to pay the debts of the corporation. Hearing was had and the court decreed that two hundred thousand dollars of the original stock remained unpaid, that nothing had been paid on the increased capital stock, and that the amount required to be raised was two hundred and eighty-one thousand, one hundred and twenty dollars. Pursuant to that judgment the court ordered a call and assessment on the whole capital stock, original and increased, of one hundred per cent., less any sum or sums that may have been paid thereon. Due and proper notice was given of that adjudication at the time it was made. What the bill of complaint prays is for an account of the stock of each of the three issues by each respondent; how and in what manner, and to what extent the same has been paid for, and that the respondents be decreed to pay the par value of the same severally held by them, less any amounts they may have paid for the same.

Respondents demur and set up two grounds of defense: 1. The statute of limitations. 2. That they are not liable to the assessment set up in the bill of complaint. Due consideration will be given to both defenses, but it will be more convenient to examine the one addressed to the merits, before considering the question whether the claim is barred by the statute of limitations.

Considered broadly, the bill of complaint seeks to enforce from the respondents the payment of the entire capital stock of the company, or such portion of the same as may be necessary to pay the debt of the corporation, less the amount any particular holder of stock may have paid towards his shares.

Three classes of shares were issued, as plainly appears from the allegations of the bill of complaint: 1. Shares to the

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amount of three hundred and fifty-three thousand, seven hundred and ninety dollars, fraudulently issued to the directors in payment for the mining lands which they at a greatly overvalued estimation conveyed to the corporation. 2. Unpaid shares to the amount of forty-six thousand, two hundred and ten dollars, issued to the directors without any consideration. 3. Shares to the amount of one hundred thousand dollars, issued by the corporation to such persons as took an equal amount of the mortgage bonds of the corporation at ninety per cent.

Viewed in the light of these suggestions, it is plain that it is sufficient for the respondents to show that the complainant cannot sustain any claim against them as holders of the first issue of the original stock, as the bill of complaint does not charge that the respondents hold shares of any particular issue of the stock, or of either of the other issues. Such being the state of the pleading, it is open to the several respondents to assume that his stock, as charged, is wholly of the first-class of the stock which was issued to the directors in payment for the mining lands, the rule being that pleadings which are uncertain or ambiguous, must be taken in the sense most adverse to the pleader. (Story's Eq. Plead. (7th ed.), § 257; *Foss v. Harbottle*, 2 Hare, 461; *Simpson v. Fogo*, 1 Johns. & Hem., 18; Ayckbourn Ch. Prac., 113; *Parker v. Nickson*, 7 L. T., N. S., 461.) Certificates of shares of that kind were issued to the amount of three hundred and fifty-three thousand seven hundred and ninety dollars, and nothing being alleged to the contrary, the several respondents in the controversy may properly assume that they are charged with holding shares in the capital stock of that issue. Stock certificates of that issue were entered upon the books of the company as shares paid up in full.

Issued as these shares were to the directors in payment for the mining lands, they were, as between the grantors of the land and the directors issuing the shares, fully paid up, as the shares paid for the land, and the land conveyed paid for the shares, and all this appears upon the books of the company. Transferees of the shares took the certificates with nothing on

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their face to show any unfairness and with nothing appearing on the books of the company to put them upon inquiry. Suppose that is so, still the complainant contends that such payment was made in mineral lands at a fraudulent valuation, not binding on the corporation. Admit that, and still the fact remains that the land was actually received by the company in full payment for the stock, and that the shares were issued and delivered as fully paid-up shares. Taken as a whole, the averments of the bill of complaint show that the transaction in purchasing the mineral land and issuing the first-class of stock in payment for the same was a gross fraud upon the company, which cannot be sustained; but it does not follow that the present suit against the respondents is the proper remedy to redress the injury, for the reason that the contract was duly executed by the execution of the deed of conveyance to the corporation, and by issuing full paid-up shares to the corporation for the whole amount of the agreed consideration of the mineral land. Nothing can be plainer in legal decision than that the title to the mineral land passed to the corporation, and that the title to the paid-up shares passed to the directors. Formally executed as the contract was, it must stand until it shall be rescinded, or the assignee, if he prefers that course, may retain what the company received for the stock and seek redress in damages against those who defrauded the corporation. Ample redress is at his command; but he certainly cannot be allowed to disaffirm the contract only in part, and affirm it as to the residue, as he must do in order to maintain the present suit against the respondents.

Beyond all question the present respondents are *bona fide* purchasers and holders of shares in the capital stock of the company, which the books of the company show were fully paid for by the directors, and which, by the terms of the contract between the directors and the grantors of the mineral land, were fully paid in the manner stipulated by the contract. Under such circumstances it cannot be that the complainant, without disaffirming the contract, can be allowed to set up the theory that the property taken in payment of the shares was

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less than their estimated value, and to seek redress for the difference against *bona fide* purchasers of the same in the open market. Gross fraud may have been perpetrated between the parties to the sale and purchase of the mineral land, but it is nevertheless true, so far as the shares of the capital stock are involved, that the shares, as between the corporation and innocent purchasers of the stock in open market, without notice, knowledge, or means of knowledge of the fraud, were paid up, as shown by the books of the corporation. Notice of the fraud, as respects the respondents, is not alleged, nor is there an intimation in the bill of complaint that any facts or circumstances were known to the respondents to put them upon inquiry in respect to any such imputation. Innocent purchasers of the stock in the open market are not liable in such a case, but the remedy of the corporation is against the guilty perpetrators of the fraud in their individual capacity. Support to the opposite theory is attempted to be derived from the adjudication of the Bankrupt Court; but the decree of the Bankrupt Court only adjudicates that for the purpose of paying off the indebtedness of the company a call and assessment be made on the stock of one hundred per cent., less any sum or sums that may have been paid thereon.

Properly considered as a whole, the decree of the Bankrupt Court does not absolutely fix and determine the amount to be assessed. Instead of that, it merely calls for one hundred per cent., less all payments. Nor does the decree in any respect contradict the theory that the class of stock first issued was fully paid up before it was put upon the market; and, if so, the court is of the opinion that the proper remedy of the complainant is against the perpetrators of the alleged fraud, which he might have enforced the moment he was appointed assignee of the bankrupt's estate. Holders of shares issued improperly stand on a different footing from the holders of shares which the company had no power to issue, as the purchaser in the latter case acquires nothing, and cannot in general be held as a contributory. (Lindley on Part. (3d ed.), 1381; *Bank v. Alison*, L. R., 6 C. P., 54; S. C., Id., 222.) But the mere fact

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that a person has become a shareholder pursuant to a scheme which is *ultra vires* will not relieve him from liability as a contributory, if the shares he has taken can be considered as legally existing, and he was himself a party to the scheme, or had knowledge of the fraud. Even where the shares were fraudulently issued, it is necessary to give strict attention to the precise facts, in order to ascertain what are the rights of the parties.

In this case the respondents were not subscribers to the stock, but the purchasers of the shares in the open market as paid-up shares. It was held in *Carling's case* that, where the contract was to take paid-up shares, the court could not convert the contract into one for unpaid shares, for reasons which are obviously sound and correct. (L. R., 1 Ch. D., 115.) Where there is a contract, even if fraud be imputed, the party seeking redress must disaffirm the contract, or proceed for damages against the perpetrators of the fraud. Such a party must throw over the agreement altogether, or he must take it as a whole. He cannot adopt it as to one part and reject it as to the rest. (*De Ruwigne's case*, L. R., 5 Ch. D., 306.) Certain shares of capital stock were allotted as fully paid-up shares, and the court held, that as the shares had been allotted to a stranger as paid-up shares they could not be considered otherwise, and that neither he nor his alienees could be liable to contribute in respect of the shares. (*Ex parte Currie*, 7 L. T., N. S., 486.)

Argument to show that the transaction of issuing the stock in payment for the mineral land would have been valid if unmixed with fraud is scarcely necessary, as the proposition is one which finds support in the daily transactions of life. (*Spargo's case*, L. R., 8 Ch. App., 407.) Shareholders are not required to suspect fraud, or to institute inquiries, where all seems fair and conformable to the requirement of law and fair dealing. (*Waterhouse v. Jameson*, L. R., 2 Sc. App., 29.) Where certificates of shares were issued as fully paid up, when in fact no payment had been made, it was held in the Chancery Court of Appeal, reversing the vice-chancellor, that by the issue of the certificates the company were estopped from alleging that

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they were not paid up, and that an innocent holder of the shares could not be placed on the list of contributories in respect to such shares as unpaid shares. (*Nicholls' case*, 26 W. R., 334.) Three of the judges gave opinions. The Master of the Rolls: "When you have a receipt given you by the company, a final receipt, as a certificate of payment, what more is a *bona fide* purchaser to ask for, and what occasion has he to make inquiry? He has the representation of the company by the certificate that the shares are fully paid up. It appears to me the company, having made that representation by the certificate, to be used by the vendor as evidence of title, is estopped from saying afterwards that the company has not received the money.

. . It appears to me impossible that the company should be allowed to say the shares were not paid up in due course." James, L. J.: "Every person connected with the company who issues a certificate for paid-up shares in money, when the money has not been paid, is guilty of a personal wrong towards the company, and may be made answerable for it in exactly the same way and to the same extent as if the money had been taken out of the coffers of the company to pay up the shares, or as if, by some fraud of the directors and officers, receipts had been given for the payment when payment had not been made. If any person is a party to such a breach he can be made answerable for it; but that cannot affect the position of one who says you made a representation to me, and you are bound by every principle of law and equity to make good the representation upon the faith of which I was induced to act." Thesiger, L. J., held that any such shareholder may show either that the shares have been paid up in fact, or that the company whom the liquidator represents have, by their words or conduct, estopped themselves from disputing that the shares have been so in fact paid up. Certificates of shares in due form were issued as paid-up shares, and there is much reason to hold that the corporation, as to innocent holders of the same, is estopped to set up the defence that they are void. They admit that the shares were paid up to the extent of fifty per cent., and the proceedings of the Bankrupt Court contains a finding of the same im-

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port, which strengthens the proposition that the corporation is estopped to set up the defence that the certificates are void. (*Riche v. Railway*, L. R., 9 Ex., 224.) Power to issue shares was possessed by the company, and hence the rule that a holder takes nothing where the power is entirely wanting does not apply. (*Ferguson v. Landram*, 5 Bush., 230; *Stace and Worth's case*, L. R., 4 Ch. App. 682.) Cases arise, however, where the suit being against the perpetrators of fraud, or against holders of the stock, with notice that it was fraudulently issued, or with knowledge of such facts and circumstances as legally put them upon inquiry, the rule is different. Equity in such a case regards the property of the corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it in whosoever possession it may be transferred, unless it has passed into the hands of a *bona fide* purchaser; and the rule is well settled that stockholders are not entitled to any share of the capital stock, or to any dividend of the profits, until all the debts of the corporation are paid. (*Railroad v. Howard*, 7 Wall., 392.) Assignees in bankruptcy in such a case represent creditors as well as the bankrupt, and may disaffirm the contract or retain what passed to the bankrupt and proceed for damages against the perpetrators of the fraud, or against subsequent transferees of the stock with notice that it was fraudulently issued, or with knowledge of such facts and circumstances as legally put them upon inquiry. Decided cases which assert that rule are quite numerous and decisive. Two or three cases of the kind deserve consideration, of which the following is perhaps the most important. Money was owed to the corporation for a subscription to the capital stock, and the debtor and the officers of the company entered into an agreement to extinguish the stock debt, and to convert it into a debt for the loan of money. Bankruptcy of the corporation ensued, and the assignee claimed that the stock debt was due. Mr. Justice Miller gave the opinion, and, in replying to the argument that the assignee can assert no greater right than the bankrupt, said: "The assignee is the representative of the creditors as well as the bankrupt. He is appointed by the credi-

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tors. The statute is full of authority to him to sue for and recover property, rights and credits, where the bankrupt could not have sustained the action, and to set aside as void transactions by which the bankrupt would be bound. . . . Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation is a trust fund for the benefit of the general creditors of the corporation." (*Sawyer v. Hoag*, 9 N. B. R., 145, 17 Wall., 610.) To the same effect also is the case of *Upton v. Tribilcock*, where the opinion was given by Mr. Justice Hunt. He decided that the *original* holder of stock in a corporation is liable for unpaid instalments of stock without an express promise to pay the amount, and that a contract between such a subscriber and the corporation, or its agents, limiting the liability therefor, is void, both as to the creditors of the company and its assignee in bankruptcy; that representations by the agent of a corporation as to the non-assessability of its stock beyond a certain percentage of its value constitute no defence to the action against the holder of the stock to enforce payment of the entire amount subscribed, *where the holder has failed to use due diligence to ascertain the truth or falsity of such representations*. (13 N. B. R., 171; 1 Otto, 45; 2 Cent. L. J., 784.) Due care and diligence were not exercised by the purchaser in that case, though the proof was full to the point that he was legally put upon inquiry. (*Thomas v. Bartow*, 48 N. Y., 193.)

Half a century before these cases were decided, Judge Story held that the capital stock of a corporation was a trust fund for the payment of the debts of the corporation, and that it might be followed into the hands of the stockholders, or of any persons *having notice of the trust* attached to it. (*Wood v. Dummer*, 3 Mason, 308.) Trusts are enforced not only against those persons who are rightfully possessed of the trust property, as trustees, but also against all persons who come into possession of the property bound by the trust, *and with notice of the same*; and whoever comes so into possession is considered as bound, with respect to that special property, to the execution of the trust. (*Taylor v. Plumer*, 3 M. & S., 562; *Adair v. Shaw*,

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1 Sch. & Lef., 243.) Reported cases almost without number lay down the same rule, but those referred to will be sufficient to illustrate the principle. Notice is essential to liability in such a case, and he who alleges notice must prove the allegation. If the shares come in the regular course of business into the hands of a purchaser for a valuable consideration, those who challenge the transaction, says Lord Cairns, must prove that such purchaser had notice of the facts. Hence, the only doubt is whether the certificates came into the hands of the holder without notice. Three other judges, to wit, Lord Hatherly, Lord Selborne, and Lord Blackburn, gave opinions, each to the same effect, and the House of Lords, all the judges concurring, held that the party sued as contributor was not liable, inasmuch as he took the shares as paid-up shares without notice that the representation was not true. (*Burkinshaw v. Nicholls*, 26 W. R., 819.)

Nothing is alleged in the bill of complaint tending to show that the respondents were participants in the fraud, or that they had notice of the transaction, or knowledge of any facts or circumstances tending to put them upon inquiry; and if there were any such matters alleged in the bill of complaint it could not benefit the complainant, as it is settled law that in such a case the cause of action arose in favor of the complainant when the estate of the bankrupt corporation vested in him as the assignee in bankruptcy.

Where the charter of a bank contained a provision binding the individual property of its stockholders for the ultimate redemption of its bills in proportion to the number of shares held by the stockholders respectively, the Supreme Court held that the liability of the stockholder arose when the bank refused or ceased to redeem and became notoriously insolvent. (*Terry v. Tubman*, 2 Otto, 156.) Just the same question, with others, was presented to the Supreme Court in a subsequent case, in which the court held, the chief-justice giving the opinion, that the liability of the stockholders upon their unpaid subscriptions is that of debtors to the bank, and that all such balances passed to the assignee under the assignment, which,

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by the Bankrupt Act, is "of all the property, estate, credits and assets of the bankrupt, whether a corporation or an individual," and, for all that is shown in the record, the stockholders were liable to suit at any time for the recovery of the balance due from them, as such stockholders. (*Terry v. Anderson*, 5 Otto, 628; *Kennedy v. Gibson*, 8 Wall., 498; *Commonwealth v. Bank*, 3 Allen, 42; *Baker v. Bank*, 9 Met., 182.) Apply that rule to the case before the court, and it follows that even if the bill of complaint had charged that the respondents had notice of the fraud, or were put upon inquiry in that regard, it would not have benefited the complainant, as in that event his claim would have been barred by the two years' limitation of the Bankrupt Act. (*Bailey v. Glover*, 12 N. B. R., 24, 21 Wall., 342.) Purchasers of stock, where it appears upon its face that it was only partially paid up, may be held liable to pay all the unpaid instalments; but the authorities to that effect have no application in this case. (*Webster v. Upton*, 1 Otto, 65; 3 Cent. L. J., 402; *Upton v. Hansbrough*, 10 N. B. R., 369, 3 Biss., 417.)

Adjudged cases in which it has been held that creditors or assignees in bankruptcy may enforce such payments, when the corporation would be estopped to do so, are suits against original subscribers or transferees, implicated in some way in the fraudulent transaction. (*Upton v. Tribilcock*, 13 N. B. R., 171, 1 Otto, 45, 2 Cent. L. J., 784.) Failure to use due diligence when put upon inquiry was the ground of the decision in that case. (*Oakes v. Turquand*, L. R., 2 Eng. & I. App., 325.) Whatever remedy for the fraud the assignee had, it is evident he might have pursued at any time after he acquired title to the bankrupt's estate. (*Ex parte Currie*, 7 L. T., (N. S.) 486; *Carling's case*, L. R., 1 Ch. D., 115; *Alison's case*, L. R., 9 Ch. App., 6; *De Ruwigne's case*, L. R., 5 Ch. Div., 306.)

Demurrer sustained; bill of complaint dismissed.

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UNITED STATES CIRCUIT COURT—OREGON.

NOVEMBER 25, 1878.

A demurrer for want of equity will not lie to a bill that is not deficient in substance, although for some technical reason—as the lapse of time or want of jurisdiction in the court—the relief sought for cannot be attained in that suit.

A demurrer that a bill does not state facts sufficient to constitute a cause of suit is unknown to chancery practice, and at most is nothing more than the general demurrer for want of equity.

An objection to a bill, in which the complainant describes himself as an assignee, that he is not legally such assignee, must be made by plea, and not demurrer.

A suit by an assignee to set aside a fraudulent conveyance, made by the bankrupt after his discharge, of property concealed prior thereto, is not a suit to annul such bankrupt's discharge, and may therefore be brought in the Circuit Court.

Such suit may be brought at any time within two years from the discovery of the fraud by the assignee or those whom he represents.

The District Court which granted a discharge alone has jurisdiction of a proceeding to annul it; and *semble*, that such proceeding must be brought by the creditor, and may be brought at any time within two years from the discovery of the fraud for which it is sought to be set aside.

The Statute of Limitations of the State where the bankrupt resides applies to the proof of debts against his estate; and such statute continues to run against such debts after the adjudication in bankruptcy, and therefore no claim can be proven or enforced against such estate, unless an action could be maintained thereon in the courts of such State.

The estate of a bankrupt, after satisfying the valid claims against it, belongs to the bankrupt, and therefore a conveyance by him, alleged to be fraudulent as against creditors, will not be set aside on a suit by the assignee, where it appears that there are no debts provable against the estate.

*H. B. NICHOLAS, Assignee, v. JAMES W. MURRAY,
et al.*

THE facts appear fully in the opinion.

John B. Waldo, for the complainant.

Joseph N. Dolph, for the defendants.

DEADY, J.—This suit was brought on May 21, 1878, to have a discharge in bankruptcy, heretofore granted to the defendant Murray, declared fraudulent and void; and to have certain conveyances of lots 1, 2, 7, and 8, in block 65, in Caruthers' addition to Portland, set aside, as being made to defraud the creditors of said bankrupt.

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The material facts stated in the bill are, that on June 6, 1868, the defendant Murray was duly adjudged a bankrupt in the District Court of this district, upon his own petition, filed therein on May 30, 1868; that an assignee of his estate was appointed, and acted as such until his discharge on April 17, 1872; and that on February 20, 1869, said Murray fraudulently procured his discharge in bankruptcy; that it appeared from the schedules of said bankrupt that his assets amounted in value to only two hundred and fifty-eight dollars, all of which was set apart to him as exempt, and that his creditors were four in number—three of whom resided in San Francisco and one in Missouri; that these debts aggregated five thousand, five hundred and twenty-seven dollars and forty-eight cents, and arose upon simple contract, four thousand dollars of which was contracted in Missouri, and became due not later than January, 1864, the remainder—one thousand, five hundred and twenty-seven dollars and forty cents—being contracted in California, and coming due not later than August, 1866; that the California creditors, relying upon the statement in said schedule, from which it appeared there were no assets applicable to the payment of claims against the estate, failed to prove their debts; that the debt stated to be due the Missouri creditor was not proven, and is false and fictitious; that at and before the filing of the petition aforesaid the bankrupt was the owner of the premises aforesaid, and during the year 1867 erected a dwelling thereon, but fraudulently omitted the same from his schedule; that the legal title thereto was in a third person, who held the same in trust for the bankrupt, and with intent to defraud the creditors of the latter; that on July 13, 1869, said third person conveyed the premises to the bankrupt, who continued to hold the property in his own name until February 4, 1878, when he conveyed the same to his co-defendant, without any or upon a grossly inadequate consideration, with intent to defraud his creditors, and that said defendant now holds the same in trust for the bankrupt, and with intent to defraud the creditors of the latter; and that none of said California creditors, nor said assignees, ever knew or became aware of

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the alleged fraud concerning said property until December, 1877.

The defendants demur to the bill separately, but allege the like causes of demurrer.

The first cause is the general one: that the complainant has not made out a case which entitles him to any relief; and the second is like unto it: that the bill does not state facts sufficient to constitute a cause of suit. But there is no such defect or insufficiency in the substance of this case as will sustain a demurrer for want of equity. On the contrary, the case made by the bill is one of a gross and palpable fraud, against which the complainant is entitled to have the relief prayed for, unless for some special and technical cause—as the lapse of time, a mistake in the forum, or the like—this suit cannot be maintained. The second cause is borrowed from the Code of Practice, but I believe is unknown to equity pleading. So far as it has any significance, it amounts to an allegation that there is no equity in the bill, and in effect is the equivalent of the first cause. They are neither well taken, and are both overruled.

The third and seventh causes are substantially the same, and are both to the effect that the complainant is not entitled to sue, because he does not really sustain the character he pretends to—that is, he is not the lawful assignee of the estate of Murray. But the complainant is described in the bill as the assignee of the estate, and that is sufficient on demurrer, both at law and in equity. If the defendants wish to contest the right of the complainant to sue in the character assumed—as the assignee of Murray's estate—he must make the objection by plea denying the right. The case is like the one where a party sues as administrator. The defendant cannot assume that the complainant is not a lawful administrator and question his right to sue in that character by demurrer, but he must make the objection by a plea of *ne unques* administrator. (Story's Eq. Pl., Section 727; 1 Chit. Pl., 525; Curt. Eq. Prac., 159.) Neither is the demurrer well taken so far as these causes are concerned.

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The sixth cause of demurrer is that this court has no jurisdiction to hear the cause or grant the relief, prayed for. This is insufficient as a special demurrer, because it does not give any reason why this court is without jurisdiction. But on the argument the ground of the objection was disclosed, as follows: This is a suit, among other things, to annul the bankrupt (Murray's) discharge upon the ground of fraud in obtaining it, and no court has jurisdiction of that matter but the District Court that granted it.

The argument is, that as by § 5119 of the R. S. a discharge in bankruptcy, subject to certain exceptions, of which this case is not one, shall "release the bankrupt from all debts, claims, liabilities, and demands, which were or might have been proved against the estate in bankruptcy;" and as by § 5120 of the R. S. provision is made that any *creditor* "who desires to contest the validity of the discharge, on the ground that it was fraudulently obtained, may at any time within two years after the date thereof apply to the court which granted it to annul the same;" it follows that no one but a *creditor* can maintain a proceeding to annul a discharge, and that no court but the court which granted it has jurisdiction of the same.

But, on the other hand, it is maintained that, correctly speaking, this is not a proceeding to annul a discharge, but simply to set aside certain fraudulent conveyances whereby the property of the bankrupt has been and now is covered up and prevented from coming to the hands of his assignee, and that the bankrupt is made a party to the suit, not for the purpose of affecting in any manner his discharge, or establishing or enforcing any claim against him personally, but to relieve the property which rightfully belongs to his assignee from the effects of the fraudulent conveyances received and made by him since the date of the discharge.

There is no doubt but that a direct proceeding to annul a discharge must be brought in the District Court which granted it; and the better opinion seems to be that it cannot be attacked or called in question otherwise or elsewhere. (*Way v. Howe*, 4 N. B. R., 677, 108 Mass., 502. *Contra, Perkins v. Gay*,

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3 N. B. R., 772.) It may be also that such suit must be brought by a creditor in person, and not by his representative, the assignee. But whether the limitation of two years within which such proceeding may be brought is to be counted from the date of the discharge or the discovery of the fraud, on account of which it is sought to set it aside, is a question upon which my mind, in the light of *Bailey v. Glover* (12 N. B. R., 24, 21 Wall., 342), inclines to the latter view.

Apart, then, from the question—is this a suit to annul a discharge?—there is no doubt of the jurisdiction of the court to hear the cause and grant the relief. The suit is one by the assignee against the defendant claiming an adverse interest, “touching certain property . . . of the bankrupts transferable to or vested in the assignee,” and jurisdiction of it is expressly conferred upon this court by Section 4970 of the R. S. It is not barred by the limitation of two years prescribed by Section 5057, because it is alleged in the bill that the fraud was not discovered by the complainant, or the former assignee, or any of the creditors until December, 1877; and in *Bailey v. Glover, supra*, the Supreme Court held that the general principle applies to this limitation, so that where the suit is intended to obtain redress against a fraud concealed by the party, or which from its nature remains secret, “the statute does not begin to run until the fraud is discovered by or becomes known to the party suing, or those in privity with him.” The same ruling was made by Mr. Justice Curtis, in *Carr v. Hilton* (1 Curt., 230), upon a similar limitation, contained in Section 8 of the Bankrupt Act of 1841; and this agrees with the rule prescribed by the law of this State in cases of fraud and mistake. (Or Civ. Code, Section 378.)

My best impression is, that this is not a suit to annul the bankrupt's discharge, and that so far this court has jurisdiction of it. Indeed it is not certain that he is a necessary party to the suit. The only relief that can be obtained against him is a discovery. The remaining relief—the conveyance of the property to the assignee, or the setting aside of the fraudulent deeds—is sought only against his co-defendant, in whom the

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title to the premises is now vested by the wrongful act of the bankrupt. Suppose, for instance, that after the bankrupt's discharge he should receive a conveyance of property purchased by him before he was adjudged a bankrupt, or should unlawfully obtain possession of some of the personal property of the estate, would a suit by the assignee against the bankrupt, to compel a conveyance or delivery of this property to himself, be a proceeding to annul the discharge, or could the bankrupt shelter himself behind this certificate, and defraud his creditors of the property with impunity? I think not. The discharge relates back to the filing of the petition; and as to any subsequent intermeddling with or act concerning the estate done or suffered by him, he is liable to the assignee or creditor as any third person. In this case the bankrupt, after his discharge, wrongfully took the title to the property, well knowing it to belong to his estate in bankruptcy, and with the like knowledge and the intent to defraud his creditors subsequently conveyed to his co-defendant, and his discharge, which is a protection against suits on account of any debt, demand or liability existing at the time of the adjudication, is no defence to any proceeding on this account.

The fourth cause of demurrer is, that this suit was not commenced within two years from the date of the bankrupt's discharge. This of course assumes that this is a suit to annul the discharge, and that the statute commenced to run from the date of the discharge, whether the fraud was then discovered or not. Both these assumptions are, I think, incorrect. The demurrer as to this and the sixth cause is not well taken.

The fifth and last cause of demurrer is, that it appears from the bill that the claims of the creditors mentioned therein were barred by the statute of limitations before the commencement of this suit.

In the consideration of this question, I think it must be taken for granted that there are no other creditors of the bankrupt than those named in his schedule and mentioned in the bill. There is no allegation in the bill that there are any other creditors. It must also be admitted that all these claims,

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though not barred by the statute of limitations of Oregon, at the date of the adjudication, were so barred before the commencement of this suit—the causes of action arising thereon having accrued more than six years prior thereto. (Or Civ. Code, Section 6.)

The question, what effect have the statutes of limitations of the several States upon the proof of debts in bankruptcy, has not been passed upon by the Supreme Court, and the decisions of the lower courts upon the matter are conflicting.

In *Re Ray* (1 N. B. R., 203), Judge Blatchford held that a debt, although barred by the statute of the State in which the debtor resided, was provable in bankruptcy unless barred throughout the United States.

In *Re Sheppard* (1 N. B. R., 439), Judge Hall held that a debt against which the statute of limitations of the State had run, was nevertheless a debt, and might be proved and allowed in bankruptcy, for the reason that there was no statute of the State (N. Y.) or the United States which prevented it. On the other hand, in *Re Kingsley* (1 N. B. R., 329), Judge Lowell held that a debt barred by the statute of the State where the debtor resides cannot be proved against his estate in bankruptcy, which agrees with the English rule. (*Ex parte Dewdney*, 15 Ves., 749.) In *Re Harden* (1 N. B. R., 395), Judge Fox made the same ruling. In *Re Reed* (11 N. B. R., 94, 6 Biss., 250), Judge Blodgett held that the defence of the statute of limitations might be made “to the claim of a creditor seeking to prove his debt in bankruptcy whenever that defence might be made in a suit in the State where the debtor resides.” In *Re Noeson* (12 N. B. R., 422, 6 Biss., 443), Judge Dyer ruled that a debt barred by the statute of Wisconsin could not be proved in bankruptcy therein. In *Re Cornwall* (6 N. B. R., 305), Judge Woodruff held that the courts of the United States, when sitting as Courts of Bankruptcy, were as much bound by the statutes of limitations of the States in which they sit as in ordinary cases, and therefore a debt barred by the statute of New York was not provable therein in bankruptcy.

From this summary of the cases it will be seen that the de-

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cided weight of authority is in favor of the application of the statute of limitations to claims in bankruptcy, and, in my judgment, that of reason also. Doubtless Congress might have established a uniform rule of limitation as to the proof of debts in bankruptcy, as it may do in regard to proceedings in the national courts generally. (*Peiper v. Harmer*, 5 N. B. R., 252). But it has not done so, and the inference therefrom is strong and convincing that it was the intention to leave the matter to be governed by the local law. This is more evident from the fact that if a claim is contested upon the proof, an appeal lies to the Circuit Court (Sections 4980, 4984, R. S.) where the claim must be declared upon and tried as in an action at law. In such action the court would be bound under Section 34 of the Judiciary Act (Section 721, R. S.) to give effect to the statute of limitations of the State, and if the claim was barred by such statute the creditor could not recover. It can hardly be supposed that Congress intended that the State statute of limitation should be applicable to the claim on the trial in the Circuit Court and not so in making proof of it in the District Court.

My conclusion is, that the statute of limitations of the State where the debtor is adjudged a bankrupt applies to all debts due from the bankrupt with the same effect as if the claim was then sued upon in the State court.

The next question is, if a claim is not barred when the petition in bankruptcy is filed, does the statute of limitations continue to run against it thereafter, or may it be proven at any time after the adjudication, although the period prescribed by the statute as a bar to an action thereon has elapsed?

In *Re Eldridge* (12 N. B. R., 540), Judge Hughes held, that the statute ceases to run from the commencement of the proceedings in bankruptcy, and if a debt is not then barred it may be proven at any time afterwards. In support of this ruling the case of *Ex parte Ross* (2 Glynn & Jam., 46), and cases arising under the Massachusetts Insolvent Law were cited. In *Ex parte Ross, supra*, the commission issued in 1810 and the debt was due in the same year. On an application to prove the

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debt in 1824, and an objection that six years had elapsed, the vice-chancellor held that the statute did not run against a creditor after a commission issued; that the commission was a trust for the benefit of all the creditors, and the statute never ran against a trust; and upon appeal to the lord chancellor, this ruling was affirmed. The case *In re Eldridge* is the only one I have found in the national courts upon the point.

I am not satisfied with the doctrine of this case. It seems to me it avoids in a great measure the rule that the local statute of limitations shall govern. But for the adjudication in bankruptcy, these claims would all have been barred before 1873. And yet this adjudication in no way hindered the creditors from proving these claims in the Court of Bankruptcy before the expiration of six years from their maturity, and thus have prevented the bar of the statute from attaching to them. The bar of the statute is founded upon the presumption of payment from the lapse of time, and there is as much reason in presuming payment or satisfaction of a debt maturing after the bankruptcy of the debtor as before. Both on the ground of public convenience and private security the presumption ought to prevail in the one case as well as the other. The notion that the estate becomes a trust fund in the hands of the assignee, and therefore the statute of limitations ceases to run against an unproved and unknown claim upon such fund, seems to rest upon a mistaken analogy. True, the assignee may be called a trustee by operation of law—in *invitum*—to distribute the estate according to law; that is, to pay the valid subsisting claims as far as the assets will permit, and to pay over the residue, if any, to the debtor. But this does not make each creditor, whether known to the assignee as such or not, a *cestui que trust*, between whom and the assignee there is that relation of personal trust and confidence that prevents any presumption arising to the prejudice of the former from mere lapse of time. On the contrary, there is no actual trust and confidence between the parties—prior, at least, to the proof and allowance of the creditors' demand, and therefore it cannot be that, by reason of the adjudication in bankruptcy, his claim is

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exempt from the ordinary law of proof and presumption, but may be dug up at any time and proved against the estate, when, in the common course of affairs, the evidence of its payment or illegality is lost or forgotten. I do not forget, in this connection, that the debts in question are upon the bankrupt's schedules. But the doctrine that there is an actual trust between the assignee and each creditor, and therefore the statute of limitations does not run against the latter after an adjudication in bankruptcy, applies, if at all, to debts off the schedules as well as those upon them. Neither is the mere fact that a claim is mentioned in the schedules any sufficient security against the danger of delay in making proof thereof. The claim, although upon the schedules, may not be valid as against the other creditors, if at all. Indeed, in this very case, it is alleged in the bill that the principal debt named in the bankrupt's schedule is fictitious and fraudulent.

An assignee, like an administrator, is really the officer or agent of the law, to distribute the estate among those legally entitled to it. Each creditor is interested in preventing the allowance of illegal claims—claims which could not be collected by the ordinary process of law.

The statute (Section 5067, R. S.) provides, that "All debts due and payable from the bankrupt at the time of the commencement of the proceedings in bankruptcy, and all debts then existing but not payable until a future day, . . . *may be proved against the estate of the bankrupt.*"

It must be admitted that this language, taken literally and alone, would permit the proof of these debts. There is no limitation in the statute upon the time of making the proof. But it must be construed with reference to existing laws upon the subject of "debts due and payable"—among others, the local statute of limitations. Considered in this connection, a simple contract debt after six years from maturity being no longer a "debt due or payable," the statute must be construed as if it read—"may be proved against the estate of the bankrupt, if done so before the lapse of time has raised the presumption of their payment or satisfaction."

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Of course, a case may arise where the limitation upon the proof of the claim would expire between the filing of the petition and the adjudication in bankruptcy, in which event it might be necessary to hold that this period should not be counted in the limitation, or that the creditor should have some reasonable time after notice of the adjudication to make his proof. Indeed this is a proper subject of legislation, and the Bankrupt Act should have contained a provision covering the whole subject of limitation upon the proof of debts, and not left it to be worked out in the courts by means of otherwise unnecessary and profitless litigation.

Having reached the conclusion that the debts mentioned in the bill cannot be proven against the estate of the bankrupt, it follows that this suit cannot be maintained.

For whatever the character of the transactions complained of concerning this property, the court cannot interfere with it, unless it appears that the assignee represents some creditor who has a claim which he is now entitled to have paid out of it. The remainder of the bankrupt's estate, if any, after the payment of all valid debts, belongs to the bankrupt himself, and the assignee holds it in trust for him. (*In re Hoyt*, 3 N. B. R., 55 ; *In re Lathrop*, 5 N. B. R., 43.)

To grant the relief prayed for in this bill would, then, be a useless act. It does not appear that there are any debts that could be proven against the estate, and therefore if the property was given to the assignee, he would be bound to reconvey it to the bankrupt.

A decree will be entered dismissing the bill.

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UNITED STATES CIRCUIT COURT—E. D. MICHIGAN.

Upon a bill filed by an assignee in bankruptcy, the Circuit Court has power to enjoin the prosecution of an action of trover in a State court against the marshal for seizing the property of a third person under his warrant in bankruptcy.

JOSEPH L. HUDSON, Assignee, v. SAMUEL SCHWAB et al.

On motion for an injunction.

Complainant, who was the assignee in bankruptcy of Schott & Feibish, filed his bill to restrain the defendant, Schwab, from the further prosecution of an action of trover against the marshal of this district for taking possession, under a warrant in bankruptcy, of certain goods claimed to belong to him. The bill also prayed that the sale of these goods by Schott & Feibish to Schwab, under which the latter claimed to be entitled to them, be decreed to be fraudulent and void as against the complainant and the creditors of Schott & Feibish.

H. C. Wisner, M. E. Crofoot, and G. V. N. Lothrop, for the complainant.

Don M. Dickinson, for the defendants.

BROWN, J.—This case turns upon the jurisdiction of the Bankrupt Court to enjoin parties from prosecuting a suit in trover in the State court against the marshal, for seizing property claimed by a third person under his warrant to take possession of the goods of the bankrupt. The question is certainly one of great importance, the more so as it involves a possible conflict with the State courts, in several of which similar actions, arising from seizures under the same warrant, are now pending.

I had occasion recently to decide in the case of *Evans v. Pack* (7 C. L. J., 409), that this court had no power to enjoin the prosecution of an action of trespass or trover in the State court, brought against the marshal for seizing the property of a third

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party upon an execution at common law. It was then suggested that if the marshal had been acting under a warrant in bankruptcy, a bill by the assignee might be maintained under the general power given by the Bankrupt Law to administer the estate of the bankrupt, to ascertain and liquidate the liens and other specific claims thereon, and to adjust the various priorities and the conflicting interests of all parties. The case then under consideration was treated as falling clearly within the inhibition of R. S., Section 720, denying to the Federal courts the power of staying proceedings in the State courts; but it was thought that such a bill as this might fall within the exception noted in that section, of "cases authorized by a law relating to proceedings in bankruptcy." Indeed, I had supposed the numerous adjudications of Circuit and District judges throughout the country had settled the law in that regard, and no doubt remained of the power of the District Court to wind up the entire estate of the bankrupt, and to determine every question connected therewith. It is claimed, however, with great earnestness, that the Supreme Court has never lent its sanction to the doctrine, and that in the recent cases of *Eyster v. Gaff* (13 N. B. R., 546, 91 U. S., 521), and *Clafin v. Houseman* (15 N. B. R., 49, 93 U. S., 130), it has expressed its disapprobation of all attempts to interfere with the jurisdiction of the State courts in deciding questions arising incidentally in connection with bankrupt cases. Indeed, counsel for the defendant did not lay so much stress upon the inability of the court to enjoin in this particular case, as upon the want of power in all cases to interfere with parties litigating in State courts.

There are undoubtedly certain expressions used by the learned judge who delivered the opinion in *Eyster v. Gaff* which lend some support to the inference drawn by defendant's counsel, but the case itself decided only that a suit for the foreclosure of a mortgage in a State court may proceed to a decree, notwithstanding the bankruptcy of the mortgagor, pending the proceedings, and that the State court is not bound to take notice of the adjudication unless the assignee appears and asks to be made a party. It may be said to establish the proposition

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that State courts may lawfully proceed with all suits against the bankrupt or his estate, notwithstanding the bankruptcy. It does not decide that the Bankrupt Court has not the power in its discretion to restrain the plaintiff from prosecuting such suits when, in the opinion of the court, they may have been collusively or improperly begun, or may throw an obstacle in the way of the prompt settlement of the estate. The case of *Clafin v. Houseman* decides nothing except that an assignee might, before the late revision, resort to the State courts for the collection of the assets of the bankrupt. Whether this can be done under R. S., Section 711, is left an open question. It may be remarked, in this connection, that Mr. Justice Bradley, who delivered the opinion in this case, in the case of *Goddard v. Weaver* (6 N. B. R., 440), expressed no doubt of the power of the District Court to stay a sheriff in proceedings to sell under a mortgage foreclosure or even to set aside the sale, although in that particular case he refused to disturb it. In delivering the opinion, he observes: "I cannot regard the sheriff's acts as void in law nor as voidable or subject to control, except upon cause shown in a court having bankrupt jurisdiction. The Bankrupt Court is the appropriate court to investigate where any question is made as to the validity of the judgment, and proceedings under it may be restrained."

If this power does not exist, it is not easy to see how the Bankrupt Law can be effectually administered. Mortgages may be foreclosed without our assent, and the assignee compelled to pay off the mortgage, or bid the property in at the sale without opportunity for negotiation or power to realize something for the estate by private sale. He can only contest fraudulent claims by appearing in the State court, and where such claims are numerous may be driven from one county to another to defend claims which might all be adjusted in a single suit. The settlement of an estate may be delayed by frivolous appeals, or by new trials, or wasted in fruitless litigation. The assignee may rely upon defences peculiar to the Bankrupt Law and not available to him in the State courts. Should such defences be improperly overruled, and it is safe to

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assume that such cases will occur (see *Bromley v. Goodrich*, 15 N. B. R., 289, 40 Wis., 131), the assignee is remediless except by an appeal to the Supreme Court of the United States, involving tedious delays and great expense. As observed by the Superior Court of New York, in *Mills v. Davis* (10 N. B. R., 340), "the other powers of a Bankruptcy Court over an estate would accomplish little in dividing the estate among the creditors if the court did not gain the power to save it from dispersion or illegal transfer as soon as the proceeding in bankruptcy began." It was held in this case that where a sheriff had collected money upon an execution, and was afterward enjoined by the District Court from "interfering with or disposing of the bankrupt's property," this injunction was a sufficient answer for the sheriff to make to an order from the plaintiff requiring him to pay over the money. The necessity for an occasional interference with actions against the bankrupt's estate in the State courts is forcibly put by Mr. Justice Story, in the case of *Ex parte Christy* (3 How., 292-319).

The nature and extent of the jurisdiction of the District Court as a Court of Bankruptcy was first considered in this case, and the opinion of the court has afforded a text for most of the subsequent discussions upon the proper functions and office of a Bankrupt Law. The case was an application for a writ of prohibition to the District Court upon the ground it had transcended its powers in decreeing the invalidity of a sale by a State court upon the foreclosure of a mortgage. In affirming the power of a District Court in this regard, Mr. Justice Story delivered an exhaustive and learned disquisition, and in the course of his opinion remarks: "We entertain no doubt that under the provisions of the sixth section of the Act of 1841, the District Court does possess full jurisdiction to suspend or control such proceedings in the State courts, not by acting on the courts over which it possesses no authority, but by acting on the parties through the instrumentality of an injunction or other proceedings in equity, upon due application made by the assignee, and a proper case being laid before the court requiring such interference. Such a course is very

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familiar in courts of chancery, in cases where a creditor's bill is filed for the administration of the estate of a deceased person, and it becomes necessary or proper to take the whole assets into the hands of the courts, for the purpose of collecting and marshalling the assets, ascertaining and adjusting conflicting priorities and claims, and accomplishing a due and equitable distribution among all the parties in interest in the estate. Similar proceedings have been instituted in England in cases of bankruptcy, and they were, without doubt, in the contemplation of Congress, indispensable to the practical working of the bankrupt system. But because the District Court does possess such a jurisdiction under the act, there is nothing which requires that it should in all cases be absolutely exercised. On the contrary, where suits are pending in the State courts, and there is nothing in them which requires the equitable interference of the District Court to prevent any mischief or wrong to other creditors under the bankruptcy, or any waste or misapplication of the assets, the parties may well be permitted to proceed in such suits and consummate them by proper decrees and judgments." These remarks, however, were but *dicta*.

The direct question of the power of the District Court to interfere and set aside proceedings in the State courts came up in *Peck v. Jenness* (7 How., 612). To an action of assumpsit against the bankrupt in a State court, commenced by attachment, the assignee, who was admitted to defend, pleaded an order of the District Court in bankruptcy, upon his petition that the attachment was not a valid lien, decreeing that the sheriff deliver the goods over to him or account for their value. It will be observed that Mr. Justice Story had retired from the bench, and that its personnel had otherwise changed to some extent, since the decision in *Ex parte Christy*. The court held, pp. 624-625, that the suit pending before the Court of Common Pleas was not a suit or proceeding in bankruptcy, and, although the plea of bankruptcy was interposed by the defendants, the court was as competent to entertain and judge of that plea as any other. "It had full and complete jurisdiction

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over the parties and the subject matter of the suit; and its jurisdiction had attached more than a month before any act of bankruptcy was committed." . . . "It follows, therefore, that the District Court had no supervisory power over the State court, either by injunction or by the more summary method pursued in this case, unless it has been conferred by the Bankrupt Act. But we cannot discover any provision in that act which limits the jurisdiction of the State courts, or confers any power on the Bankrupt Court to supersede their jurisdiction, to annul or anticipate their judgments, or wrest property from the custody of their officers." . . . "It confers no authority on the District Court to restrain proceedings therein by injunction or any other process, much less to take the property out of its custody or possession with a strong hand." This case is obviously irreconcilable with the dicta of Mr. Justice Story in *Ex parte Christy*, and was so treated by the Supreme Court in *Carroll v. Carroll's lessee* (16 How., 275-287). The remarks of the court in that connection, with regard to their dicta, are worthy of quotation here, and may well be borne in mind in reading the more recent decisions above cited: "And, therefore, this court, and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties." Quoting from the opinion of Mr. Chief-Justice Marshall in *Cohens v. Virginia* (6 Wheat., 399): "It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent; other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." But the case of *Peck v. Jenness* must be considered as establishing the

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proposition that, under the Act of 1841, this court had not the power to enjoin or interfere with parties litigant in the State courts. The language of that act, however, was comparatively restricted. It vested in the District Court jurisdiction "in all matters and proceedings in bankruptcy arising under this act," extending such jurisdiction "to all cases and controversies in bankruptcy arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to all cases and controversies between such creditor or creditors and the assignee of the estate, whether in office or removed, and to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt and the close of the proceedings in bankruptcy."

The Act of 1867, however, is much broader and more explicit. The phraseology of the first section is, to a large extent, taken bodily from the language of Mr. Justice Story, in *Ex parte Christy*. It extends not only to the cases enumerated in the Act of 1841, but "to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties; to the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors."

The argument of the defendant in this case derives some support from the fact that Congress did not adopt the whole language of the learned judge in that case, wherein he enumerates among the powers of the District Court the "preventing, by injunction, or otherwise, any particular creditor or person, having an adverse interest, from obtaining an unjust and inequitable preference over the general creditors, by improper use of his rights or his remedies in the State tribunals;" but that omission has certainly not been treated by the Circuit and District Courts generally as involving a negative pregnant.

It is to be regretted that the power of the District Court, under the Act of 1867, was not, in the early administration of

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the law, taken up and fully discussed in the light of these opinions. Jurisdiction to enjoin officers of the State courts and parties litigant therein was generally assumed to exist, even before the revision, and the few cases in which it was denied have been disregarded or overruled. In the cases of *In re Campbell* (1 N. B. R., 165), and *In re Burns* (Id., 174), Judge McCandless denied the authority of the District Courts to issue injunctions to the State courts, or to parties litigating before them, relying upon *Peck v. Jenness*. He announced that Justice Grier, who delivered the opinion in *Peck v. Jenness*, concurred in this case; but in the subsequent case of *Irving v. Hughes* (2 N. B. R., 62), the question again came before Justice Grier, sitting with Judge Cadwallader in the Eastern District of Pennsylvania. The court held that where an insolvent debtor had given a warrant of attorney, under which judgment had been rendered in a State court, and an execution levied upon his stock in trade, the Bankrupt Law gave to the court jurisdiction to prohibit such creditor by injunction from proceeding further under such execution. The court undertook to distinguish the former cases, arising in the Western District, on the ground that they involved questions which the courts of the State were fully competent to decide. "Here, on the contrary, the question is not fully cognizable under the jurisprudence or legislation of the State." Remarking upon the case of *Peck v. Jenness*, and the Act of 1793, prohibiting injunctions against State courts, the court observes: "But in the present case, if the Act of 1793 would otherwise have been applicable, the present Bankrupt Law would exclude its application so far as the present question is concerned. The State court cannot be enjoined; but the litigant in it may be restrained from doing what would frustrate or impede the jurisdiction expressly conferred by the Bankrupt Act." The opinion seemed to have been based upon the ground that the defence was one peculiar to the Bankrupt Act, of which the State court could not take cognizance. The case seems to be, however, a departure from the rule laid down in *Peck v. Jenness*, that in no case could the State courts or parties litigant

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therein be interfered or enjoined, and it possesses additional significance from the fact that the same judge delivered the opinion in both cases. In *Re Schnepf* (1 N. B. R., 190), Judge Benedict enjoined the sheriff of a State court from proceeding to sell under an execution certain personal property levied upon prior to the filing of the petition in bankruptcy, and the assignee was directed to take possession and sell at private sale. The power to enjoin was conceded by the judgment creditor, and consequently was not discussed, although the judge intimated an opinion that such power seemed necessary to a proper administration of the Bankrupt Law. In *Re Bernstein* (1 N. B. R., 199), Judge Blatchford enjoined a sheriff from selling goods upon an execution, under the 40th Section, though the order was subsequently modified so as to permit a sale, directing the sheriff to hold the proceeds subject to the order of the Bankrupt Court. In *Penhington v. Lowenstein* (1 N. B. R., 570), a demurrer to a bill, praying that the sheriff be enjoined from paying the proceeds of certain property to the plaintiffs in an attachment, and that he be required to pay the same over to the assignee in bankruptcy, was overruled. The question of power was not discussed.

See also as to the power to enjoin, *In re Bowie* (1 N. B. R., 628); *Jones v. Leach* (Id., 595). In *Re Wallace* (2 Id., 134), the power to enjoin was asserted by Judge Deady as necessary to preserve and distribute the estate of the bankrupt among the creditors. In *Bill v. Beckwith* (2 N. B. R., 241), Mr. Justice Swayne quoted with approval the language of Mr. Justice Story in *Ex parte Christy*, and remarked: "Its success (that of the Bankrupt Law) was dependent upon the national machinery being made adequate to the exigencies of the act. Prompt and ready action, without heavy charges or expenses, could be safely relied on where the whole jurisdiction was confined to a single court in the collection of assets, in the ascertainment and liquidation of liens and other specific claims thereon." In *Re Kerosene Oil Company* (2 N. B. R., 528), Judge Benedict enjoined the foreclosure of a mortgage in a State court upon the petition of the assignee. In *Re Fuller* (4 N. B. R., 115), Judge

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Deady again enjoined a creditor from enforcing a judgment in a State court against the property of the bankrupt. This was, however, upon the petition of the bankrupt. In *Re Davis* (4 N. B. R., 715), certain creditors were enjoined, upon petition of the assignee, from foreclosing a mortgage in the State court. The injunction was subsequently dissolved, "with the reservation to this court of full power and authority to interfere and control or arrest the proceedings, whenever it shall appear expedient for the interests of all concerned that it should exercise the power given it by law, to assume the exclusive administration of this portion of the bankrupt's estate." The learned judge held that the jurisdiction of the ordinary tribunals was not taken away by the mere force of adjudication, but that the Bankruptcy Court had jurisdiction to suspend such proceedings by acting upon the party. In *Re Mallory* (6 N. B. R., 22), a creditor and sheriff were enjoined by the District Court from selling the property upon execution. The question here first received an elaborate discussion; all the prior cases were cited, and the jurisdiction of the court fully sustained. This case was affirmed on appeal by Mr. Justice Field, who expressed his unqualified approval of the reasoning of the District judge. The same decision was made in *Re Lady Bryan Mining Company* (6 N. B. R., 252). In *Sampson v. Clark* (6 N. B. R., 403), Judge Woodruff held that the District Court had ample power to restrain the claimant of a lien obtained by collusion with the bankrupt from proceeding elsewhere to enforce the lien. "The power to control the creditors in this respect, I think, is clearly given. Two considerations illustrate the importance of the power, which are especially applicable to liens by attachment:

1. Without such power there is no adequate protection to other creditors against collusion between the bankrupt and the claimant, not even aided by the authority given to the assignee to defend; and

2. The early settlement of the estate may sometimes require that the Court in Bankruptcy should take the determination of claims which are in dispute into its own hands." In *Markson*

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v. *Heaney* (4 N. B. R., 510, 1 Dill., 497), Judge Dillon affirmed the power of the District Court to enjoin the prosecution of a foreclosure suit begun after the proceedings in bankruptcy were instituted.

Such was the state of the authorities when the Revised Statutes were passed, and the important exception was incorporated in Section 720, of "cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." This literally would include only those cases where the power to stay proceedings was expressly given by the Bankrupt Law. On referring to this law, we find but two sections to which this language could possibly apply ;

1. Section 40, R. S., Section 5024, by which power is given to the court by injunction to restrain the debtor and any other person in the meantime from making any transfer or disposition of any part of the debtor's property. This evidently refers to preliminary injunctions, which expire with the adjudication, and have no reference to injunctions against parties litigant in the State courts.

2. Section 21, R. S., Section 5106, providing that any suit or proceeding by a creditor shall, upon application of the bankrupt, be stayed to await the determination of the Court in Bankruptcy on the question of discharge. This confers no express power to enjoin. The Bankrupt Law is the law of the land, and just as binding on the citizens and courts of the several States as are the State laws. (*Clafin v. Houseman*, 15 N. B. R., 49 ; 93 U. S., 130, 136, 137.) This stay of proceedings may be, and usually is, granted by the State court itself upon application of the bankrupt. Such has been the practice in this State ; but conceding that this court may by injunction stay such proceedings, it can only be done under this section *upon the application of the bankrupt*, and the section has no application to injunctions granted upon the petition of the assignee. It was not and could not be claimed as authorizing injunctions in the cases above cited. But, obviously, this section was inserted in the statute for some purpose. It was intended to refer to some power which had been claimed or exer-

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cised under the Bankrupt Law to issue such injunctions, and it seems probable that Congress thereby intended to recognize these decisions as settling the power to interfere with State courts wherever it became necessary in the proper administration of the Bankrupt Law.

Since the revision, the decisions have been uniformly in favor of such jurisdiction. In *Re Atkinson* (7 N. B. R., 143), the sheriff of a State court was attached for violating an injunction, issued from the District Court, in selling property seized upon execution. In *Re Ulrich* (8 N. B. R., 15) Judge Blatchford enjoined certain creditors from prosecuting suits against the bankrupt in the State of Illinois. The prior authorities were fully considered, and the learned judge apparently entertained no doubt of his jurisdiction. This ruling he repeated in the following case of *Hyde v. Bancroft* (8 N. B. R., 24). In *Re Dillard* (9 N. B. R., 8), Judge Bond, in sustaining an injunction to restrain the commissioners of a State court from selling real estate, observes: "It has never been questioned that the Bankrupt Court could take possession of the property of a bankrupt incumbered by the liens of judgment creditors, and the fact that process had been had to enforce those liens can make no difference. It is not a question of jurisdiction or of right, but of discretion. In *Sutherland v. Lake Superior Ship Canal, Railroad & Iron Company* (9 N. B. R., 298), Judge Emmons fully sustained the power of this court to arrest litigation in the State courts, observing, with his accustomed vigor of language, "The remaining domain of the State tribunals which cannot be interfered with is so trivial and exceptional as to leave the inference a strong one that it was not intended to be protected by Congress." (See also to the same effect, *In re Shuey*, 9 N. B. R., 526; *In re Citizens' Savings Bank*, Id., 152; *Zahn v. Fry*, Id., 546-552; *Fowler v. Dillon*, 12 N. B. R., 308; *Walker v. Seigel*, Id., 394.) In *Hewett v. Norton* (13 N. B. R., 276), Judge Woods affirmed the action of the District Court in restraining parties to an action from proceeding to take property out of the possession of the assignee in bankruptcy. In *Re Whipple* (13 N. B. R.,

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373), Judge Blodgett enjoined complainants in a creditor's bill from further proceeding in the State courts. And, finally, in *Re Duryea* (17 N. B. R., 495), proceedings for foreclosure in a State court were restrained by the injunction of the District Court.

While, if this were an original question, I should feel very grave doubts as to my power to enjoin this suit, and while the law cannot be said to be absolutely settled by any decision short of the court of last resort, the general concurrence of co-ordinate tribunals throughout the country, in asserting this power, fully justifies me in assuming it to exist. It would be simply presumptuous in this court to set itself against such an overwhelming current of authority. In the case under consideration, the action against the marshal is not in replevin, but in trover, so that no question of actual possession arises. This, however, seems to me to make no difference in principle. If judgments are rendered against the marshal, the assets of the estate are diminished by the amount of these judgments.

In the case of *Kellogg v. Russell* (11 N. B. R., 121), an injunction was granted by Judge Woodruff under precisely similar circumstances. The main purpose of the bill is, as he observes, to set aside alleged fraudulent conveyances to the defendant. This is the fundamental ground and purpose of the suit, and the injunction sought is purely incidental and conservative.

Main v. Glen (7 Biss., 86) is also upon all fours with the case under consideration. Jurisdiction to enjoin an action in the nature of trespass against the marshal was put upon the ground that the Bankruptcy Court had "taken the property, and it alone should have the right to determine the question to whom it belonged." It appears, too, that doubts had been expressed by the State courts of their competence to entertain a defence under the Bankrupt Law.

The bill, though in the Circuit Court, is ancillary and in aid of the jurisdiction of the District Court (which by R. S., Secs. 711, Sub. 6, and 563, is exclusive in all cases in bankruptcy), and may be maintained regardless of the citizenship of the parties.

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As the question of jurisdiction was the only one argued, I do not deem it necessary to discuss at length as to whether this is a proper case for the exercise of a discretion to interfere. It is understood, however, that there are six suits pending in four different courts against the marshal, under practically the same state of facts. This would seem to make it a proper case for transferring the litigation to this court. The motion for an injunction is granted.

UNITED STATES DISTRICT COURT—N. D. NEW YORK.

In an action brought by the bankrupt against one B., the defendant interposed a counterclaim. The bankrupt having been adjudicated before the trial of the action, B. offered no evidence in support of his defence, and judgment was rendered against him. *Held*, That B. was not thereby precluded from proving his claim in the bankruptcy proceedings.

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THE facts appear sufficiently in the opinion.

A. M. Beardsley, for Buchanan.

G. W. Adams, for bankrupt.

WALLACE, J.—Except as regards the seventh item of the claim of Buchanan, I agree with the register in his conclusions.

As to the seventh item, the register holds that it should be allowed, were it not that, having set it up as a defence to the action brought by the bankrupt against him, and judgment having been recovered against him in that action, Buchanan is precluded from proving it now upon the doctrine of *res adjudicata*. It is not disputed that Buchanan might have litigated the claim now presented in that action; but it is contended in his behalf that, as proceedings in bankruptcy were instituted and the plaintiff adjudged a bankrupt prior to the trial of that

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action, the judgment does not estop the assignee, and therefore does not estop Buchanan; and it is also contended that the recovery in that action is not a bar now, because Buchanan offered no evidence upon the trial in support of his defence, and therefore there was no adjudication upon the merits of his claim.

It is settled that the commencement of proceedings in bankruptcy does not *per se* stay the prosecution of pending suits by or against the bankrupt. (*Eyster v. Gaff*, 13 N. B. R., 546, 91 U. S., 521). Proceedings in such suits may be stayed upon the application of the bankrupt; but if they are not, the suits proceed to judgment with the same effect as though there had been no proceedings in bankruptcy. If the cause of action involved is of the character of a provable debt, the assignee in bankruptcy, if he desires to contest it, may do so at the charge of his estate. When the suit has been brought by the bankrupt, the assignee may move to be substituted in the action; and if he does not elect to exercise this privilege, if the case proceeds, he cannot be heard to complain of the result. So, in the present case, if the judgment had been rendered in favor of Buchanan against the bankrupt, that judgment would have been conclusive as against the assignee in bankruptcy, as an adjudication of the validity and amount of Buchanan's claim; and as it would have been conclusive as against the assignee, it is legally conclusive in his favor against Buchanan as to all questions therein determined in favor of the bankrupt.

It remains, then, to inquire if the effect of the judgment is qualified or rendered nugatory because no evidence was in fact offered by Buchanan relative to the issues set up by him by way of defence. The record upon its face purports to be a decision in favor of the plaintiff upon an issue between the parties, wherein the plaintiff alleges that defendant is indebted to him, and defendant alleges that plaintiff is indebted to him, a result which apparently involves the conclusion that the claim of the defendant was unfounded; so that the claim of Buchanan seems to have been decided adversely to him upon the face of the record. It does not follow, however, that he is

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precluded from showing that his claim was not actually the subject of judicial inquiry and determination. The general rule is, that the judgment or decree of a court of competent jurisdiction is final as to matters thereby determined, and as to such other matters as the parties might have litigated under the issue and which might have been determined.

This is the rule, however, which prevails in cases where the former judgment is invoked as an absolute bar to a second action upon the same cause of action, and does not apply to the present case, where the judgment is not set up as a technical bar, but is sought to be enforced as an adjudication adverse to the claimant upon an issue which might have been litigated in the former action. In its application to such a case, the rule is well stated by Mr. Justice Field (*Cromwell v. County of Sac*, 94 U. S., 352): "In all cases where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the former action, not what might have been thus litigated and determined."

While it is true the claim of Buchanan might have been litigated in the former action, and while the presumption that it was actually litigated arises from the record, yet this is only a presumption, and it may be controverted and overthrown by proof *dehors* the record. A great variety of cases illustrate the extent to which the presumption arising from the record may be repelled; as where the trial went off on a technical defect, or because the debt was not due, or because the plaintiff was under a temporary disability.

Thus it is competent to show that a *nolle prosequi* was entered as to a claim embraced in the proceedings, or that a part of the controversy was specifically withdrawn from the consideration of the court (*Brockway v. Kinney*, 2 Johns., 210; *Snider v. Croy*, Id., 227; *Louw v. Davis*, 13 Id., 227; *Foster v. Milliner*, 50 Barb., 385), in which case the judgment in the former suit is not, as to the claim withdrawn, a bar. It is not necessary to show that the cause of action was affirmatively

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withdrawn from the consideration of the court. It is only necessary that it appear that the real merits of the second action have not been decided in the first; and this follows if it is shown that the cause of action in the second suit has not in fact been litigated in the first. (*Seddon v. Intop*, 6 Term R., 607). If the cause of action has been litigated, however slightly or ineffectually, it cannot be said that it might not have been determined.

The case of *Seddon v. Intop* was one where the plaintiff in a former action declared on a promissory note and for goods sold, but upon executing a writ of inquiry, after judgment by default, gave no evidence in the court for goods sold, and it was held that the judgment was not a bar to his recovering for the goods in another action. This case has been recognized and approved by many authorities, and is directly in point here, where, as in *Seddon v. Intop*, the proof is that no evidence was given concerning the issue now pending between the parties. Another case directly in point is *Burwell v. Knight* (51 Barb., 267).

The effect of the judgment, as to the defence interposed by Buchanan, is analogous to that of a judgment by default upon failure of the party to appear. He was in court, but was silent. If the plaintiff could not have recovered without disproving, expressly or by necessary implication, the existence of the facts set up by way of defence, the judgment would be an estoppel, because the estoppel is not confined to the judgment, but extends to all facts involved in it as necessary steps, or the groundwork upon which it must have been founded. (*Burtiss v. Shannon*, 99 Mass., 203.) As an adjudication that Buchanan was liable to the plaintiff in the amount of the judgment as for an existing and valid indebtedness, the judgment is conclusive; but it does not determine, expressly or by necessary implication, that the plaintiff was not liable to Buchanan upon a distinct and independent cause of action.

From these views it follows that the claim of Buchanan, comprised by the seventh item of his account, must be allowed. As I agree with the register in his conclusions and in the rea-

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sons by which they were reached, relative to the other items of the claimant's account, it is unnecessary to advert to the questions therein involved.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

JULY 8, 1878.

The bankrupts drew certain drafts upon their correspondents in Liverpool, who accepted the same. The drafts were drawn against consignments of merchandise, which the bankrupts agreed to, but failed to make. After the dishonor of the drafts, the holder received from the acceptors fifty per cent. of the amount due on them, in full release of all claims against such acceptors, but without prejudice to the rights of the holder against other parties. The acceptors subsequently released all claims against the bankrupt. *Held*, That the holder of the drafts had a right to prove against the bankrupts for the whole amount of the drafts.

*In re ARCHIBALD BAXTER AND DUNCAN C.
RALSTON.*

THE facts appear sufficiently in the opinion.

Abbott Bros., for assignee.

Redfield & Hill, for creditor.

CHOATE, J.—Re-examination of proof of debt.

The Canadian Bank of Commerce became the holder for value before maturity of two drafts drawn by the bankrupts on their correspondents in Liverpool, who accepted the same.

Since the dishonor of the draft, the bank has received from the acceptors fifty per cent. of the amount due on them, without prejudice to the rights of the bank against other parties.

The drafts were drawn against consignments of merchandise, which the drawers undertook to make, but which they failed to make.

It is claimed that the acceptor has released the drawer from all demands. It is now insisted by the trustee of the bankrupt that the holder of the draft can only prove for the

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amount thereof, after deducting the payment made by the acceptor, but the register allowed the proof for the whole amount.

The bankrupt is in this case the principal debtor, and the acceptor is the surety.

It is conceded that but for the release of the drawer by the acceptor, the creditor would have the right to prove for the whole amount. *Downing v. Traders' Bank* (11 N. B. R., 137).

But it is insisted that in this case, as the acceptor has released all his claims against the drawer, the creditor cannot prove for the whole, because the acceptor has no claim on the surplus after the creditors shall be paid in full.

There is no merit in this position.

If the dividend which the creditor shall be entitled to shall, with the sum received from the surety, exceed the whole amount of the drafts, that may be a proper case for an application to the court to have this surplus disposed of, according to the equities of the parties, if the acceptor is then properly before the court; meanwhile, to reduce the amount for which the creditor is to prove would certainly prejudice his rights, contrary to the conditions under which he accepted the money from the surety.

He is entitled to prove for the whole amount, and if there shall be a surplus it can then be determined to whom it belongs.

The entry of a judgment does not affect the right to prove the debt.

Petition dismissed.

Further argument having been granted, the following opinion was rendered Aug. 10, 1878:

CHOATE, J.—This case was submitted on briefs of counsel, and a further oral argument has been granted on application of the assignee, on account of the very large amount involved in the decision. After a careful reconsideration of the matter, I am still of opinion that the bank has a right to prove against the bankrupts for the whole amount of the drafts held by it.

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The receipt by the bank from the acceptors of the drafts, who, on the facts shown, stood in the relation of sureties for the bankrupts, of fifty per cent. in release of all claims on them, did not operate to discharge any part of the debt of the bankrupts to the holder of the drafts. It was not accepted as payment in part of their debt to the holder, nor was the sum so paid endorsed on the drafts as part payment, nor was there any agreement to that effect. On the contrary, it was agreed to be received without prejudice to the rights of the holder as against other parties on the drafts. The rights thus expressly reserved certainly included the right to present their claim against the bankrupt for its full amount.

There is no question that the holder of commercial paper may prove for the full amount against all the parties liable, as he may maintain actions against them all.

The holder was not bound to receive this dividend from the surety. He might have rested on his right to sue him, which would not in any way have prejudiced his right to prove the debt for the full amount against the bankrupt, unless and until the surety should have paid the drafts in full, in which case, by the terms of the Bankrupt Law, the surety would have been subrogated to the rights of the holder.

Instead of suing the surety, the holder accepted fifty cents in full as against him without prejudice to his rights against the bankrupt. Even without this reservation, the surety, having paid *part* of the debt only, would have no right to prove for that part against the bankrupt unless the holder should fail to prove the debt; but the right of the holder would still remain to prove for the whole debt, partly for himself and partly as trustee for the surety (Section 5070). Now, the reservation of rights agreed upon in this case had no meaning, it seems to me, if it did not save the existing right of the holder to prove, for his own benefit, on the whole debt, until he received, with the payment made by the surety, full satisfaction of the debt.

Such being the rights of the parties at the time the dividend was received from the surety, the subsequent release by

In re Bearn.

the surety of all claims against the bankrupt cannot possibly affect the rights of the holder, who was no party to that release, except so far as those rights are held by him, not for his own use and benefit, but for the benefit of the surety.

The surplus that the holder may receive from the bankrupt, upon proof of the debt in full, after full satisfaction of the debt, would indeed, but for the release, belong to the surety; and this surplus the surety might, as against the holder, deal with as he chose; but the surety is not a party to this proceeding, and therefore what may be the effect of the dealings between the surety and the bankrupt on the right to this surplus may and should be left till it appears that there will be such a surplus.

As it is conceded in this case that there will be none, the point is not material; but the proper order to make in the matter is, that the holder be allowed to prove for the whole amount of the drafts, reserving all questions that may arise in case he should be entitled upon such proof to dividends, which, together with the sum received from the surety, will exceed the whole amount of the drafts and interest.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

DECEMBER 16, 1878.

The right of stoppage *in transitu* depends upon the fact that the goods have not come to the actual or constructive possession of the vendee, and it is not necessary that the obstacle which has prevented this should be one that was purposely interposed by the vendor for this purpose, nor that it was one created by him directly or indirectly. Even where the seller has ceased to have any control of the goods and they are in the custody of the Government awaiting the payment of duties, the right of stoppage *in transitu* remains.

L. & Co. contracted to sell to the bankrupt one thousand and five hundred cases of wine, "to arrive," at a fixed price per case, less duties. The bonded warehouse in which the wine was stored on arrival was selected by the bankrupt, but it was stored in the name of L. & Co. Nine hundred cases were withdrawn by the bankrupt before his failure, L. & Co. signing on the withdrawal entry an authorization to him as required, by the regulations of the Treasury Department, to withdraw the goods described

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therein. After the filing of the petition in this case, L. & Co. withdrew the remaining six hundred cases, and paid the warehouse charges on the whole one thousand and five hundred cases. The note given by the bankrupt for the amount of the purchase fell due after his failure, and was not paid. On application to expunge proof of claim for the nine hundred cases, on the ground that L. & Co. had no right to take the remaining six hundred cases, and that the assignee could set off their value, *Held*, That the right of stoppage *in transitu* still existed as to the six hundred cases, and that the giving of the authorization to withdraw a part of the goods was such a separation by consent of the parties of that part from the rest that a delivery of that part is not to be considered a constructive delivery of the whole or as affecting the right of stoppage *in transitu* as to the remaining part.

In re WM. F. BEARNS.

A. J. Perry, for assignee.

H. Q. Wing, for creditor.

CHOATE, J.—This is a motion to expunge the proof of debt made by the firm of G. Lamothe & Co. for nine hundred cases of wine sold and delivered to the bankrupt. Lamothe & Co. contracted to sell to the bankrupt one thousand five hundred cases of wine, "to arrive," at a fixed price per case, less duties, and upon a credit of sixty days, for which the bankrupt was to give his promissory note. On the 2d of July, 1870, the ship having arrived, the wine was entered at the custom-house by Lamothe & Co. for warehouse.

The bonded warehouse in which it was stored was selected by the bankrupt, but it was stored in the name of Lamothe & Co. The duties were liquidated at one thousand four hundred and thirty-three dollars and eighty-five cents, and the bankrupt gave his note for the amount of the purchase, and thereafter and before the failure of the bankrupt nine hundred cases were withdrawn from warehouse by the bankrupt in several parcels, Lamothe & Co. signing on the withdrawal entry an authorization to the bankrupt to withdraw the goods described in such withdrawal entry. This authorization is required by the regulations of the Treasury Department before any person except the party entering the goods can withdraw them. Afterwards the bankrupt filed his voluntary petition, and an assignee was appointed. In December, 1870, Lamothe & Co. withdrew the

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six hundred cases still remaining in warehouse, paying the warehouse charges on the whole one thousand five hundred cases, which remained till then unpaid.

The note fell due after the failure of the bankrupt, and was not paid. It is still in the hands of Lamothe & Co. Lamothe & Co. have proved their claim for the nine hundred cases which were received by the bankrupt. This motion to expunge is made on the ground that they had no right to take the remaining six hundred cases from the warehouse; that the title and constructive possession had become vested in the bankrupt; and that the assignee can set off the value of the six hundred cases tortiously taken by Lamothe & Co.

The question is, whether, as to the six hundred cases, the right of stoppage *in transitu* still existed; and I am of opinion that it did.

The goods never came into the actual possession of the bankrupt. His selection of the warehouse in which they were stored did not alter the facts that they were stored in the name of the consignee, Lamothe & Co., and that the only way in which the bankrupt could obtain actual possession was by means of an order signed by Lamothe & Co., upon making a withdrawal entry and paying the duties. It is true that if insolvency had not intervened Lamothe & Co. would have been bound to give this authority, and that nothing else remained to be done between buyer and seller with reference to the goods, and that the buyer had fully complied with his contract of purchase.

It is insisted that this impediment to the complete control and possession of the buyer being imposed or reserved, not by the seller for his own security and benefit, but by the regulations of the Secretary of the Treasury, which are subject to alteration or repeal by him at any moment, and waived, dispensed with, or insisted upon by him or by Congress, the vendor cannot take advantage of it to take back the goods. But the authorities do not sustain this claim.

The right of stoppage *in transitu* depends upon the *fact* that the goods have not come to the actual or constructive pos-

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session of the vendee, and it is not necessary that the obstacle which has prevented this should be one that was purposely interposed by the vendor for this purpose, nor that it was one created by him directly or indirectly. If the existing regulation of the Treasury Department has prevented that possession being consummated, the nature of that regulation is of no more consequence on this question than the nature of any other fact or accident that may have led to the same result. It cannot be said that the goods were constructively in the possession of the buyer, when stored under a warehouse contract with the seller and in his name and under regulations having the force of law, which made it impossible for the buyer to get them without the written consent of the seller. Even where the seller has ceased to have any control of the goods, and they are in the custody of the Government awaiting the payment of duties, the right of stoppage *in transitu* remains. (*Northey v. Field*, 2 Esp., 613; *Burnham v. Winsor*, 5 Law Reporter, 507; *Mottram v. Heyer*, 5 Den., 629.) In the case last cited Chancellor Walworth indeed says that he thought that, if the goods had been placed in the public store under the revenue warehousing system, the right of the vendor would be gone. But in that case the goods were consigned to the vendee, and the case supposed by the learned judge is that of their being warehoused by the vendee, not, as in this case, by the vendor.

It is clear also that the giving of the authorization by the vendor to withdraw a part of the goods was such a separation by the consent of the parties of that part from the rest that the delivery of that part is not to be considered as a constructive delivery of the whole, or as affecting the right of stoppage *in transitu* as to the part remaining in warehouse. (*Tanner v. Scoville*, 14 M. & W., 28.) In fact, this right of stoppage *in transitu* is based on an equitable principle, and is highly favored; and the present case is clearly one where the right could be properly exercised.

. Motion to expunge denied.

In re Hunter.

UNITED STATES DISTRICT COURT—W. D. TENNESSEE

DECEMBER, 1878.

It is imperative under the statute that notices of all *public* sales shall be published for three consecutive weeks, whether the assignee or other officer proceeds under the power given him by the statute or under a special order of the court, and there is no power in the court or judge to change this requirement.

In re MRS. M. C. HUNTER.

To Hon. E. S. HAMMOND, Judge of said Court :

YOUR petitioner respectfully represents that he was elected assignee of the above estate, just prior to the yellow fever. The assets, consisting of millinery, did not come into his hands until the fourteenth day of August, when there was no sale for them; the same have been boxed and stored for several months. The petitioner has earnestly, but unsuccessfully, endeavored for a few days to secure a favorable offer for said stock without success, it being unseasonable and unsalable; and he is satisfied, after a thorough examination of the stock, and having had it examined by persons acquainted with its value, that the said stock ought to be sold at public auction. Petitioner has rented a very cheap and well-located small store-room, where the said stock is being opened; and as he has no authority to sell at public auction without giving three weeks' notice by advertisement, he respectfully asks for an order of sale, authorizing him to sell at auction on the sixteenth day of December, 1878, to save the expense of rent and other expenses that will amount to more than the value of the goods.

Memphis, Tenn., December, 10th, 1878.

O. WOOLDRIDGE,
Assignee.

HAMMOND, J.—Section 4 of the Act of June 22, 1874, Chap. 390, 18 Stat., 178; Bump, 10th ed., p. 367, enacts that "all notices of public sales under this act by any assignee, or officer

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of the court, shall be published once a week for three consecutive weeks, in the newspaper or newspapers, to be designated by the judge, which in his opinion shall be best calculated to give general notice of the sale." While the court has power under this section to supervise the sales made, and to direct a private sale if necessary, it has no power to change the character of notice prescribed for a public sale. It is imperative under the statute that notice shall be given for three consecutive weeks, in a newspaper or newspapers, designated by the judge, of all *public* sales, whether the assignee, or other officer, proceeds under the power given him by the statute or under a special order of the court. There is no power in the judge or court to change this requirement of the statute. The foregoing application is therefore denied.

COMMON PLEAS—PHILADELPHIA.

DECEMBER 7, 1878.

The mere filing of a petition in bankruptcy by a debtor is no bar to the prosecution of an action against him in a State court.

MURPHY v. YOUNG.

RULE for judgment for want of a sufficient affidavit of defence.

The action was assumpsit; the summons issued on 31st of July, 1878, returnable to 1st Monday in August; on the 31st of August the defendant filed a voluntary petition in bankruptcy.

The affidavit of defence set forth the filing of the petition, and claimed that the same was a bar to the suit.

Shakespeare and Heverin, for the rule.

Murphy v. Young.

There has been no adjudication, and the mere filing of a petition in bankruptcy is not sufficient to prevent judgment. (*Raiguel v. Gerson*, 2 W. N., 304.)

The petitioner has taken no steps since filing the petition, and still retains possession of his property.

Lester, contra. Filing the petition is an act of bankruptcy, and is sufficient to stay proceedings. (*Frostman v. Hicks*, 15 N. B. R., 41, 3 W. N., 202; *Platt v. Kelso*, 5 W. N., 57.)

ALLISON, P. J.—The affidavit sets up the pendency of proceedings in bankruptcy, assigning this fact as a reason why judgment should not be entered against the defendant.

The petition of the applicant was filed August 31st, 1878, and the affidavit of defence on the following Monday, September 2d. The sufficiency of the affidavit, it is argued, is established by the case of *Frostman v. Hicks* (15 N. B. R., 41, 3 W. N., 202), in which it was ruled by this court that *an adjudication of bankruptcy* is a bar to judgment in a State court, pending proceedings for a discharge. That case turned on the proper meaning of the 5106th Section of the Bankrupt Act. The defendant in that case had been declared a bankrupt, and because “no creditor whose debt is provable shall be allowed to prosecute to final judgment any suit, at law or in equity, therefor, against the bankrupt, until the question of the debtor’s discharge shall have been determined,” we sustained the sufficiency of the affidavit, which averred that the defendant had been declared a bankrupt, but not discharged, and for this reason we refused judgment; the clause of the section following that already quoted declares that any such suit or proceeding, upon the application of the bankrupt—that is, one who had been adjudicated a bankrupt—shall be stayed to await the determination of the Court in Bankruptcy on the question of the discharge; nor was there any unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge.

The facts of that case are materially different from those of the case now before us. There has been no adjudication of

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bankruptcy on the petition of the defendant Young, which is absolutely necessary to bring the case within the provisions of the 5106th Section of the Bankrupt Act. Whenever the proceedings have not resulted in an adjudication of bankruptcy, the section under which *Frostman v. Hicks* was decided does not apply, and such is the fact in the case before us; when the affidavit of defence was filed, the petition in bankruptcy had just been filed, no action could have been had upon it for want of time, and in this lies the essential difference between the case of *Frostman v. Hicks* and the present case; it was the fact that Hicks had been declared a bankrupt, but had not been discharged, that made applicable to that case the 5106th Section of the Bankrupt Law, which comes into play after the adjudication of bankruptcy, and while the question of discharge is pending before the court.

This interpretation of the law does not in any way conflict with the case of *Booth v. Meyers* (14 N. B. R., 575; 3 W. N., 196), where the sole question decided by the Supreme Court of this State, was whether a suit could be pressed to judgment by a firm against their debtor, where a petition had been presented by one member of the firm to have himself and his co-partners declared bankrupts. The court say clearly the right to pursue their debtor, by action, is not defeated by a proceeding not consummated against them by a decree; *non constat* that the plaintiffs will ever be decreed bankrupts, while their interests may demand an action to secure their debt, or prevent a bar of the statute of limitations.

Rule absolute.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1878.

Certain creditors having petitioned that a firm be adjudicated bankrupt, the marshal seized under his provisional warrant a lot of goods alleged to belong to a third party, who thereupon brought suit in trover against the marshal and four of the petitioning creditors in a State court. Upon a

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bill filed in the Circuit Court by the assignee in bankruptcy, the marshal, and the four creditors to set aside the sale to such third party as fraudulent, an injunction was ordered, staying his action in the State court. On application for a mandamus to vacate such injunction, *Held*, That as the injunction was granted in a cause over which the court had clear jurisdiction, a writ of mandamus would not lie to vacate it, and that the remedy was by appeal from the first decree.

Ex parte SAMUEL SCHWAB.

Application for an order to show cause why a writ of mandamus should not issue.

WARRE, C. J.—Certain creditors of Schott & Feibish, of Detroit, instituted proceedings in bankruptcy, March 14, 1878, against the debtors, in the District Court of the United States for the Eastern District of Michigan, and at the same time obtained a provisional order for the seizure of certain goods which it was alleged had been disposed of in fraud of the Bankrupt Law. This order was placed in the hands of Salmon S. Matthews, marshal of the district, and he, on the 29th of March, took into his possession, as the property of the bankrupts, the goods claimed by Schwab, the petitioner herein. On the 13th April, Schott & Feibish were in due form adjudicated bankrupts.

April 27, Schwab sued Matthews, the marshal, and Mabley, Michaels, Rothschild, and Hayes, four of the creditors of Schott & Feibish, in the Superior Court of the City of Detroit, for the value of the goods seized. May 6, Joseph L. Hudson was duly elected and appointed assignee in bankruptcy of Schott & Feibish, and the goods in question were thereupon turned over to him by the marshal. Since then the goods have been sold by the order of the Bankrupt Court, and the proceeds of sale remain in the hands of the assignee to be applied as part of the estate of the bankrupts, if it shall appear that the title to the goods was in the assignee at the time of the sale.

October 5, Hudson, the assignee, Matthews, the marshal, and the four creditors, defendants in the suit in the State court, filed a bill in equity against Schwab in the Circuit court for the Eastern District of Michigan, wherein they pray that the

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sale and transfer of the goods to Schwab "may be set aside and held for naught, and decreed to be in violation of the Bankrupt Act, and that said goods and chattels may be decreed to be a part of the estate of Schott & Feibish, and that the title of said Joseph L. Hudson, said assignee, to said goods, or to the funds arising therefrom, may be quieted and decreed to be perfect." It is also further prayed that Schwab and his attorneys be enjoined "from further prosecution of said suit so pending in the Superior Court of Detroit, or from the prosecution of any other or further suit in regard to the seizure of said goods, save in this (the Circuit) Court or in the Bankruptcy Court."

A preliminary injunction, after notice, was granted by the Judge of the District Court for the Eastern District of Michigan, Nov. 12, * and Schwab now asks for an order on the judge to show cause here why a mandamus should not issue commanding and enjoining him to vacate and set aside such injunction.

Mandamus cannot be used to perform the office of an appeal or writ of error. (*Ex parte Loring*, 94 U. S., 418; *Ex parte Flippin*, Id., 350.) The Circuit Court had jurisdiction of the action and of the parties for the purpose of trying the title of the assignee to the goods. The injunction was granted in the course of the administration of the cause. Injunctions may be granted by the courts of the United States to stay proceedings in the courts of a State "in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." (Rev. Stat., Sec. 720.) When the application was made for the allowance of the injunction, it became the duty of the court to determine whether the case was one in which that power could be exercised. The question arose in the regular progress of the cause, and, if decided wrong, an error was committed which, like other errors, may be corrected on appeal after final decree below.

The case is entirely different from what it would have been if the only object of the suit had been to enjoin Schwab from proceeding in the State court. There the question would have

* *Hudson v. Schwab*, ante, 480.

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been as to the jurisdiction of the Circuit Court over the cause. But here is clearly jurisdiction of the cause. The assignee in bankruptcy had the undoubted right to sue Schwab in the Circuit Court to settle the title to the goods or the fund arising from their sale. The injunction was a mere incident to the principal relief he asked. Even if not granted, the suit could go on.

Being satisfied, by the petitioner's own showing, that the error, if any, in the court below cannot be corrected by mandamus, we deny the motion for an order to show cause.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

OCTOBER 18, 1878.

The court has jurisdiction on a voluntary petition for the adjudication of a firm, to entertain and determine the question what persons in fact constitute the firm, and an adjudication based upon the determination of such fact is valid until set aside or reversed.

In 1872 the bankrupts were adjudicated upon a voluntary petition, which alleged that they composed the firm of G. & W. In 1874, in a proceeding in the State court, it was held that one A. was a general partner in said firm, and not a special partner, as he was believed to be at the time the petition was filed. On a petition filed in 1878 to set aside the adjudication, *Held*, that the application should be denied, on the ground that so long an interval had elapsed since the adjudication that rights and interests of other parties had grown up under it and been adapted to it.

In re JOHN GRIFFITH and GEORGE W. WUNDRUM.

C. Norwood, Jr., for petitioners.

W. H. Arnoux, contra.

CHOATE, J. — November 30, 1872, on the petition of George W. Wundrum, praying that he and his alleged partner, John Griffith, composing the firm of Griffith & Wundrum, be adjudicated bankrupts, they were so adjudicated, and the case has proceeded regularly ever since; an assignee having been

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appointed, assets converted into money, and in whole or in part distributed.

The petitioners, Van Dolsen and Arnot, by petition dated March 28, 1878, allege that they are creditors of the firm and have never proved their debt. That the firm consisted of Griffith, Wundrum, and one Abendroth; that the petitioners were ignorant of that fact till shortly before the time of filing their petition; that at the time of the commencement of the bankruptcy proceedings, and till long afterwards, Abendroth was believed to be a special partner and not a general partner; that in a suit brought in the Superior Court, which came to trial and decision in 1874, it was shown that Abendroth had not complied with the provisions of the law relating to limited partnerships, in respect to the time and manner of paying in his capital, and that he was held to be in fact a general partner—that this decision has been affirmed by the Court of Appeals, and petitioners allege that Abendroth was a general partner, and they pray that the adjudication be vacated on the ground that the court has no jurisdiction over copartnerships, unless all the copartners are made parties and adjudicated, and therefore that the court had no jurisdiction in this case.

Assuming that all the facts relied on are as claimed by the petitioners, still they cannot claim *as of right*, as creditors of the firm, to have the adjudication set aside. Assuming that the court has jurisdiction only over all the copartners and not over some of them less than all, still the court had power and authority, in other words had jurisdiction to entertain and determine the question what persons in fact did constitute the firm. The fact that Griffith & Wundrum alone did constitute the firm was alleged in the petition, and was necessarily found and determined by the court, before it could or did determine that the adjudication should be made.

This was the determination by the court, in the due and proper exercise of its jurisdiction, of a *fact*. Now, although that fact may be called a jurisdictional fact, nevertheless the rule of law is, that the determination by the court of a fact, though a jurisdictional fact, is binding on all parties to the suit

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and on all those who had an opportunity to be heard to contest that fact. (*Dyckman v. Mayor*, 5 N. Y., 434, and see *Bank v. Judson*, 8 N. Y., 254).

Although a case in bankruptcy is anomalous and peculiar in its forms, I think that the creditors of the firm are bound as parties by this determination, and are within the application of the principle above stated. The proceeding is against the firm's property and for the benefit of the firm's creditors. While they do not receive notice of the original application, they are made parties to the proceeding in form immediately afterwards, and are notified to come in and participate therein.

No doubt if they have any interest adverse to the adjudication, and promptly apply for relief before other rights intervene, they may have an adjudication set aside on the ground that the court erred in determining the jurisdictional fact.

This would be almost a matter of course upon an immediate application, but until the proceeding is thus opened and the fact re-determined, the judgment of the court stands and must stand as against all parties and all persons allowed to come in and be made parties; nor do I see how a mere stranger to the proceeding, if these creditors claim to be such, can have any standing *in this proceeding itself* to have such determination set aside.

The ground taken that the adjudication is in itself absolutely void is not tenable.

It is a judgment of a court, based upon the determination of a fact which it had jurisdiction to determine, and as such it is valid until set aside or reversed.

The court may open the judgment and rehear the case on suggestion of error, on the application of a party, and possibly on the application of a stranger, if he shows that he is injured thereby, and the application can be granted without prejudice to the rights and interests of others, but such an application, like any other application to open and rehear a case, is addressed to the discretion of the court.

In the present case it would clearly not be a proper exercise of that discretion to grant this application. There is no sug-

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gestion of fraud in the obtaining of the original adjudication. Griffith, Wundrum, Abendroth, and, so far as appears, all the creditors of the firm at the time of that adjudication, understood and believed that Abendroth was a special and not a general partner. Among others these creditors, though apprised of the action taken, rested upon and acquiesced in it, taking no measures, so far as appears, to investigate the fact. Afterwards other creditors, suspecting or having information of facts tending to show that Abendroth was a general partner, sued him, and in 1874 had disclosed in trials of their actions those facts. It cannot be said therefore that the facts tending to show that he was a general partner were so hidden and undiscoverable that creditors could not by diligence ascertain them long before this petition was filed.

But aside from this great delay in discovering the facts, I think the application should be denied on the ground that so long an interval of time has elapsed since the adjudication that rights and interests of other parties have grown up under it and been adapted to it.

These creditors claim that they are injured in their special interests by having this adjudication pleaded and held as conclusive against them in their suits against Abendroth as a co-partner with Griffith & Wundrum.

It may be that they have lost thereby possibilities of collecting their debts of Abendroth, but it would introduce a most dangerous precedent to set aside a judgment after six years' acquiescence, on suggestion of error of fact, for the relief of a single party who might have had the adjudication vacated at the outset if he had not been content to assume as true what was then accepted apparently without any careful examination, but without any deceit on the part of anybody, as to the real state of the case.

Perhaps these petitioners have a remedy now by having Abendroth, brought in and adjudicated as a partner with Griffith & Wundrum. Such amendments have been allowed on the discovery of a mistake. (*In re Lewis*, 1 N. B. R., 239; *In re Little*, Id., 341, and see *In re Henry*, 17 Id., 463.)

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Such a proceeding would seem to give the creditors their full rights against Abendroth's estate, if he was in fact a general partner, without the injustice that might result from vacating the adjudication of giving certain creditors an advantage over others.

But whether this remedy would be proper is not the question now before the court.

Petition dismissed.

UNITED STATES DISTRICT COURT—W. D. TENNESSEE.

NOVEMBER 27, 1878.

The register has no power to adjourn a meeting of creditors by letter, or otherwise than by attending the meeting at the time and place designated for its assembling.

The warrant in this case was returnable on September 15th, but the register was prevented from attending at said time by the prevalence of yellow fever. Being absent from the city, and a portion of the time from the State, he made orders of adjournment, and forwarded them to his assistant. *Held*, That the meeting wholly failed, and that a new warrant should issue appointing another meeting, to be served as if no warrant had ever been issued.

In re T. L. DICKINSON.

John P. Edmondson, Sol. for Bankrupt.

To Hon. E. S. HAMMOND, Judge, &c.

IN the above case the warrant was issued by the undersigned in June, returnable 15th day of September, 1878.

The register being prevented from attending at said time by prevalence of yellow fever, and being absent from the city, and a portion of the time absent from the State, made and forwarded to his assistant orders of adjournment, first to October 15th, then to November 15th, and then to November 25th. In the meantime, viz.: since November 15th, the bankrupt and such creditors as have filed claims have been notified that this

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November 25th was the day to which the matter was adjourned for election of assignee. On this, the 25th of November, 1878, said bankrupt by attorney, and the only creditors whose claims are filed—two in number—appear and ask that the case be proceeded with, without further adjournment. The warrant was duly executed both as to notices on all the creditors and by publication, so that although on the day first appointed they were prevented by the epidemic from attending, they have full knowledge of the pendency of these proceedings, and have had reasonable time since the removal of all cause for delay in filing claims, for the purpose of participating in the choice of an assignee. For all other purposes they can still file claims. More than five months have elapsed since they were duly notified by the marshal.

In the opinion of the register there is no objection to complying with the joint petition of the bankrupt and the only creditors whose claims are filed, but the question is respectfully submitted for such order as your Honor deems proper.

T. J. LATHAM, *Register*.

HAMMOND, J.—I do not concur with the register in the foregoing opinion certified by him. General Order in Bankruptcy No. 5 limits the power of the register to the time and place fixed by the court in the special order under which he acts, or to the time and place fixed by him, acting under the authority of a general order of the court. There is nothing in the Statutes or any General Order of the court, or the rules prescribed by the Supreme Court, authorizing a register to adjourn a meeting of creditors by letter, or otherwise than by attending the meeting at the time and place designated for its assembling. During the epidemic just closing the courts were virtually closed, and the meeting of creditors appointed in this case has wholly failed without any fault on the part of the creditors. Their right to choose an assignee cannot be prejudiced by a failure, under the circumstances of this case, to attend a meeting appointed at a time and place when and where a deadly disease was prevailing to such an extent that it was dangerous to hold it. Let

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a new warrant issue appointing another meeting to be served as if no warrant had ever issued. The clerk will certify this opinion to the register.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

JUNE 19, 1878.

The defective execution of a voluntary assignment for the benefit of creditors does not prevent its being an act of bankruptcy.

On the return of the order to show cause, certain creditors who had, since the filing of the petition, prosecuted to judgment actions against the alleged bankrupts, and made levies under their executions, moved for leave to intervene and contest the adjudication on the ground that the voluntary assignment which was alleged as the act of bankruptcy was void, having been executed by only three of the five partners, and in the firm name by one of the partners signing as attorney in fact for the firm, whereas, it was alleged, the partner so signing for the firm never held any power of attorney for that purpose. *Held*, That the motion must be denied; that the facts stated do not make a case of fraud or collusion to procure an adjudication to which the petitioning creditors are not in fact entitled, and that the fact that the moving creditors have made levies on the property since the filing of the petition gives them no rights as against the petitioning creditors different from that of creditors at large.

In re JAMES LAWRENCE et al.

THE facts appear fully in the opinion.

F. N. Bangs, for motion.

Geo. Bell and *E. Y. Bell*, contra.

CHOATE, J.—Petition by creditors against five partners constituting the firm of Henry Lawrence & Sons.

The Act of Bankruptcy alleged in the petition is the making of a voluntary assignment by the firm for the benefit of creditors.

Upon the return day of the order to show cause, certain creditors of the alleged bankrupts, not being petitioning creditors, appear, and move for leave to intervene and contest the adjudication upon the ground that the voluntary assignment

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was void, being executed by only three of the five partners personally, and in the firm name by one of the partners signing as attorney in fact for the firm, and the affidavits of the creditors moving to intervene allege on information and belief that the partner signing for the firm "never held any power of attorney from the firm or any member thereof, empowering him in the name of said firm to make or execute said pretended assignment."

The moving creditors have, since the filing of the petition, prosecuted to judgment actions against the alleged bankrupts, commenced before the filing of the petition, and they claim to have made levies on their executions issued under said judgments.

The motion to intervene must be denied. The moving creditors do not make a case of fraud or collusion to procure an adjudication to which the petitioning creditors are not in fact entitled. (*In re Hopkins*, 18 N. B. R., 396.)

Notwithstanding what they allege in regard to the want of a power of attorney, the voluntary assignment may be an act of bankruptcy. The defective execution of it, if defective, does not prevent its being an act of bankruptcy. (*In re Mendelsohn*, 12 N. B. R., 533).

It is entirely consistent with all the facts alleged in the moving papers that the two members of the firm not signing consented to the making of the assignment. It is not alleged that they did not consent. And if they consented it is plain enough that the assignment was an act of bankruptcy even if defectively executed.

As to the claim of the creditors moving to intervene, the fact that they had levied on the property of the alleged bankrupt since the filing of the petition gives them no rights as against the petitioning creditors different from that of creditors at large. (*In re Vogel*, 18 N. B. R., 165).

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COURT OF APPEALS—MARYLAND.

APRIL TERM, 1878.

Where a creditor has proved his claim in bankruptcy, voted upon a resolution of composition, and accepted his *pro rata* share in money and promissory notes given in pursuance of said resolution to secure payment of future instalments, he cannot sue upon his original debt in a State court, although the debtor has made default in payment of one of the instalments.

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A PETITION in involuntary bankruptcy was filed against a debtor, but he was not adjudged bankrupt. In that proceeding the creditors by resolution accepted a proposal of the debtor as follows, to wit: "I, James W. Hewlett, of the city of Baltimore, and State of Maryland, trading under the name and firm of J. Q. Hewlett & Son, respectfully make the following proposition to my creditors, that is to say: The proceedings in bankruptcy now pending in the District Court of the United States for the District of Maryland, are to be suspended, and the said creditors are to receive, in full satisfaction and discharge of their claims of every kind whatsoever against me, twenty-five per centum of the amount of said claim as follows, viz: Three per centum in cash, to be ratably distributed among them, payable ten days after a resolution accepting this offer shall be confirmed by the court, and ratified and ordered to be recorded; and the balance to make up said twenty-five per centum to be paid in money in three equal instalments, in six, twelve, and eighteen months from the date of the recording of such resolution, with interest, to be secured by the promissory notes of the said Hewlett, to be delivered to the creditors, their attorneys or assigns, within ten days after the recording of the resolutions as aforesaid. The assets of the bankrupt to be placed in the meantime in the custody of George J. Appold, of the city of Baltimore and State of Maryland; the proceeds

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of the same when collected to be applied to the payment of the said three per centum, and of the said promissory notes, as and when they shall respectively fall due."

The debtor paid the three per cent. in cash and the first instalment, but made default in payment of the second instalment. The plaintiffs thereupon brought suit to recover the original debt. The defendant pleaded the resolution of composition without averring that he had paid the second instalment. The plaintiffs demurred, and upon the demurrer being overruled set up the default in replication. The defendant demurred to the replication. The plaintiffs were dissentient creditors throughout the whole proceedings in bankruptcy.

STEWART, J.—A petition having been filed against the appellee in bankruptcy, he made a proposition for composition with his creditors, in pursuance of the 17th section of the Act of Congress of 1874, chap. 390, to wit: That the proceedings in bankruptcy be suspended, and that they should receive, in full satisfaction and discharge of their claims of every kind against him, twenty-five per cent. of the same—three per cent. in cash payable ten days after a resolution accepting this offer shall be confirmed by the court and ordered to be recorded, and the balance to be paid in money in three equal instalments, in six, twelve and eighteen months from date of recording of such resolution, with interest, to be secured by his promissory notes to be delivered to the creditors, their attorneys or assigns, within ten days after the recording of the said resolution; his assets in the meantime to be placed in the custody of George J. Ap-pold, the proceeds of the same, when collected, to be applied to the payment of the said three per cent., and said promissory notes, as they respectively fall due. This proposition was duly accepted by his creditors, at a meeting called for the purpose of considering the same, by resolution to that effect. The appellants, holding his two promissory notes, each for the sum of one thousand, seven hundred and thirty-six dollars and thirty-seven cents, being present and voting, and proving their claim in the bankruptcy proceedings. This resolution, acceding to

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the appellee's proposition, was passed by the court and recorded.

In accordance with the terms of the composition, the appellee paid in cash three per centum of the claims against him, including the appellants', and delivered to his creditors, including the appellants, his promissory notes for twenty-two per cent. of their claims, and transferred to Appold, as required by the resolution, all of his assets of every description, as security for the payment of the promissory notes.

The three per cent. in cash, and first instalment under the composition being paid, but the second unpaid, the appellants brought the suit for recovery on the original notes. Under this state of facts disclosed by the pleadings, the substantial question presented for our review is, whether the appellants can maintain this suit for recovery on the original notes.

A preliminary question of practice has been argued by the counsel for the appellants, who insists that the plea of the appellee is defective, because it sets up, as he alleges, three distinct facts, constituting three distinct defenses in one plea, to wit: 1st, the recording of the resolution in bankruptcy; 2d, the fact that the appellants were present and voted; and 3d, the pendency of the proceedings in bankruptcy. The detail of facts and proceedings, consisting of the averments of the composition and its acceptance, and its performance by the payment in money and delivery of the promissory notes of the appellee to the appellants; the fact of the appellants being present and voting, the recording of the resolution and the pendency of the proceedings in bankruptcy, was necessary to a clear understanding of the defense, and does not come within the scope of the rule against double pleading.

The statement of a multiplicity of facts, constituting the defense and material to its conclusiveness, even if there was surplusage, affords no ground for demurrer on that account. (Code, art. 75, secs. 2 and 3.) If the appellants can, notwithstanding the facts averred and admitted, collect their claim in this form, the object of the Bankrupt Law and its amendments, to wit: the discharge of the bankrupt from his debts under the

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terms provided, and the fair distribution of his assets amongst his creditors, is defeated, the proceedings in bankruptcy are nugatory, and the race for precedence amongst his creditors is open to a general scramble. Not only the Federal but the State courts are at their command.

Bankrupt laws, it is well understood, discharge the contract, contra-distinguished from insolvent laws, which only liberate the person. (4 Wheaton, 194.) Whilst the bankrupt is going through the process provided for the discharge of his debt under the direction of the only jurisdiction that can discharge these debts, is it possible that the State court can intervene and enable the creditors to pursue their remedies as if no such proceeding had taken place.

The 17th section of the Act of 1874, chapter 390, provides, that, in all cases in bankruptcy, whether an adjudication in bankruptcy shall have been had or not, the creditors of the bankrupt, at a meeting called under the direction of the court, may resolve that a composition, proposed by the debtor, shall be accepted in satisfaction of the debts due them. With some modifications, hereafter referred to, this provision is taken from the 126th section of the English Bankrupt Act of 1867, 32 and 33 Vict., Ch. 7.

Under that statute the creditors of the bankrupt may, without any proceedings in bankruptcy, resolve that a composition shall be accepted in satisfaction of their debts. Without the intervention of the court the requisite number of the creditors can determine whether he shall be discharged, and the registrar is to make registry of the resolution, if satisfied that it passed in pursuance of the statute. Under our law the composition is an incidental proceeding in bankruptcy. Proceedings in the Court of Bankruptcy commence upon the filing of the petition for an adjudication in bankruptcy, either by the debtor in his own behalf, or by a creditor against him. (Sec. 4991 of the Rev. Stat.)

The jurisdiction of that court is exclusive, except where otherwise provided by statute. (Part 1, Rev. Stat., Secs. 563, 629, 630, 639, 711, 4972; Secs. 2 and 6, 4979, 5105, 4991,

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Chap. 390, Sec. 2 of the Act of 1874.) There is a broad and well-defined distinction between the arrangement of the courts in England, in regard to jurisdiction, and between our federal and State courts. Under the constitution of our courts, growing out of the form of our government, made up of State and federal authority, the bankrupt laws clearly provide for the exclusive jurisdiction of the Federal Court over matters of bankruptcy. That subject has been by the Constitution confided to the Federal authority; when that court has acquired jurisdiction, it is not suspended by the proceeding for a composition. The 17th section declares that the provisions of a composition accepted by resolution shall be binding on all the creditors, and may be enforced by the court in a summary manner, and disobedience punished as a contempt; and if at any time it shall appear to the court that a composition can not proceed without injustice or undue delay, the court may refuse to accept or confirm it, or may set the same aside, and, in either case, the debtor shall be proceeded with as a bankrupt, in conformity with the provisions of the law, and proceedings may be had accordingly. Where that court has jurisdiction of the case and all equities between the parties, with enlarged authority over the parties and subject matter for its final disposition, would it be quite consistent with the orderly administration of justice, especially as provided in regard to the exercise of jurisdiction of the Federal and State courts, to say nothing of the limits to be observed between courts exercising a common jurisdiction, for the State courts to interfere and undertake to withdraw the proceeding, whilst *in fieri*, from the court in bankruptcy, where it had its origin and where it may be proceeded with in all its bearings and modifications?

Under the 5105th Section of the Revised Statutes, the creditors are prohibited from maintaining any suit at law or in equity for the recovery of their claims against the appellee. In this condition of things it is quite clear the appellants have no right to resort to the courts of the State for the recovery of their claims, nor to invoke their authority for the redress of their alleged grievances. (See *Miller v. McKensie*, 13 N. B.

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R., 496, 43 Md., 404.) The 17th Section of this amendatory act further provides that the composition shall, subject to the priorities specified in the act, provide for a *pro rata* payment or satisfaction *in money* to the creditors. This provision is not in the English statutes, and must have been inserted for a purpose, and there are no English decisions of cases to be referred to, as throwing any light upon the subject. It was intended to have, and does exert, a controlling influence as to the effect and operation of a composition between the bankrupt debtor and his creditors. The creditors have the right to insist upon payment of the composition proposed by the bankrupt *in money*; if they choose to accept the promissory note of the debtor therefor (which the learned Judge, in *Re Reiman and Friedlander*, 13 N. B. R., 128, 12 Blatchf., 562, noted might be done), such notes, to justify the purposes of the act, must have the same effect as so much money. Otherwise the creditors and bankrupt, by a composition postponing the payment and the failure to meet them, might avoid the operation of the Bankrupt Law, and, according to the theory of the counsel for the appellants, reinvest the State courts with jurisdiction over the subject matter and parties. Our Bankrupt Laws, as we understand them, mean by a composition, not the partial, but total satisfaction and discharge of the debt of the bankrupt, when approved by the court. The composition proposed, accepted, and performed by payment *in money*, or promissory notes equivalent thereto, is binding upon the creditors, extinguishes and discharges the debt, and is an effective proceeding to accomplish such result. (*Miller v. McKensie*, 13 N. B. R., 496, 43 Md., 404.) The creditors have no right under such circumstances to resort to the State courts for the recovery of their original debts in case the notes are not paid. If the composition is to be held as made *partly in money* and *partly in notes*, not considered as money, and the part in money is paid, but the notes are not paid, as in this case, what is to be the effect? As far as paid, is that to operate as a discharge, or does the entirety of the old debt revive, and is the jurisdiction of the court to be divided up? Such can not be the result.

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The composition must be treated as effective. Some of the English authorities (*Edwards v. Coombe*, L. R., 7 C. P. 519; *In re Hatton*, L. R., 7 Ch. App., 723; but *Ex parte Hemingway*, 26 L. T. N. S., 298, the other way), construing their statute and the effect to be given to the extraordinary resolution of the creditors for a composition upon the existing debt of the bankrupt, seem to treat it as having the same operation as a *voluntary* composition deed. The composition, under our statute, depends for its validity upon the resolution passed by the prescribed number of creditors, binding alike on all of them, if their debts are included in the statement filed by the debtor, and finally confirmed by the court. (See *Walker v. Moors*, 122 Mass., 501.) In the case of *National Bk. v. Porter* (17 N. B. R., 329, 122 Mass., 308), referred to, a material fact distinguishes it from this; there was no compliance on the part of the bankrupt with the terms of the composition.

Guild v. Butler (16 N. B. R., 347, 122 Mass., 498, 5 Cent., L. J., 423), also referred to, does not undertake to decide the question involved here. Until the bankrupt performs the terms of the composition, by payment in money or his promissory notes, to be treated as money, the composition is incomplete and ineffectual; but that would not invest the State court with jurisdiction, the remedy must be sought in the Bankruptcy Court, and the provisions of the statutes point out the mode of redress, and that must be exclusive; but when the bankrupt complies and performs the same by the payment in money, or, as in this case, with money and notes, the composition is an accomplished fact, and the results provided for in the act necessarily follow.

The creditors having proved their claims in bankruptcy, and agreed to the composition, and the *pro rata* payment having been made to them by the bankrupt, part in money and part in his promissory notes, to be treated as money, are bound thereby, and have no right to pursue the recovery of their debts through the State courts as if there was and had been no proceeding in bankruptcy.

Judgment affirmed.

In re Welles.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

AUGUST 9, 1878.

It is not a good objection to a composition that the schedules stated the real estate of the debtor as of unknown or uncertain value.

Nor is it a good objection that property standing in the name of the bankrupt's wife should have been included in the schedules, and should be deemed the property of the bankrupt, where the facts relating thereto were brought out by the testimony, and considered by the creditors in coming to the conclusion to accept the composition.

The general objection that the estate could pay more, is not one that will avail unless very clearly made out, and unless the disparity is evident.

In re HENRY S. WELLES.

Tremain & Tyler, for bankrupt.

R. F. Andrews, for opposing creditors.

CHOATE, J.—Motion to confirm composition. 1. The objection that the schedules stated the real estate of the bankrupt as of unknown or uncertain value, is not a good objection to a composition. If the schedules are imperfect or indefinite, creditors may have them amended or may get the information they may require by examination of the debtor or otherwise. 2. The objection that the house in Utica, standing in the name of the bankrupt's wife, should have been included in the schedules, and should be deemed the property of the bankrupt, must be overruled. The facts were brought out by the testimony and submitted to the creditors, and it is immaterial whether the property was named in the schedules or not.

The possibility that an assignee might by litigation recover something from this property, was no doubt one of the considerations that the creditors weighed in coming to the conclusion to accept the composition.

I cannot say that they judged unwisely in giving very little value to this possibility.

3. The general objection that the estate could pay more is

In re Hertzog.

not one that will avail unless very clearly made out, and unless the disparity is evident.

I cannot say that this is shown.

Motion granted.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

DECEMBER 7, 1878.

A debt against which the statute of limitations has run, but which is included in the debtor's schedules, is provable in bankruptcy.

In re SOLOMON HERTZOG.

J. H. Goodman, for opposing creditors.

G. Patzel, contra.

CHOATE, J.—This is a motion to expunge the proof of a debt against which the statute of limitations has run, but which was included in the debtor's schedules. The question whether such a debt is provable or not was determined in the affirmative by Judge Blatchford upon very careful consideration in the case of *In re Ray* (1 N. B. R., 203). It is insisted by the learned counsel for opposing creditors that this case has been overruled by the case of *In re Cornwall* (6 N. B. R., 305). While the latter decision of the Circuit Court expresses opinions on some points differing from those expressed by Judge Blatchford in the former case, touching some of the grounds or reasons given for his decision, yet it does not in terms overrule *In re Ray*, nor was the case one involving the principal point on which the decision of Judge Blatchford rests, which was that by the statute of limitations of New York the remedy merely is affected, while the debt is not extinguished or absolutely barred. The case of *In re Cornwall* arose under the statute of limitations of Connecticut, by which, as interpreted by the highest court of that State, a debt is absolutely barred.

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Decisions in other districts, mostly under statutes held to be of the same effect as that of Connecticut, are also referred to. But for the same reason, even if it was proper for this court to follow them upon a doubtful question already litigated and determined in this court, they are not necessarily in conflict with *In re Ray*.

In the Northern district of New York Judge Hall came to the same conclusion with Judge Blatchford. (*In re Perry*, 1 N. B. R., 220.)

For these reasons I decline to re-examine the question.

It is undoubtedly an important one, but seems not to be an open question in this court.

SUPREME COURT—MICHIGAN.

OCTOBER TERM, 1878.

The marshal has no authority under a provisional warrant to make a seizure of property outside of his district.

FRANCIS W. CARR v. *FRANK PHILLIPS*.

THE facts appear fully in the opinion.

John D. Conely, for plaintiff in error.

Joslin & Whitman, for defendant in error.

MARSTON, J.—Phillips brought an action of replevin against defendant Carr, to secure possession of certain goods. The plaintiff, Phillips, claimed to have purchased the goods in question, previous to January, 1878, from Charles N. Lewis, of Jackson, and that they were shipped from Jackson to, and received by him at Kalamazoo previous to that date.

It also appeared that on the 17th day of January, 1878, a petition was sworn to and filed in the District Court of the United States for the Eastern District of Michigan, by some of

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the creditors of said Lewis, asking that he be declared bankrupt.

Upon the same day a petition was presented to and filed in said court, praying that the property of said Lewis be seized and possession thereof taken provisionally by an officer of the court, and for the arrest of said Lewis. That thereupon, and on the 17th day of January, a warrant was issued out of said court to the marshal of said district, commanding him forthwith to take possession, provisionally, of all the property and the effects of said Lewis, and safely to keep the same until the further order of the court. That defendant Carr, who resided at Jackson, and was the Deputy Marshal of the United States, for the Eastern District of Michigan, by virtue of this warrant, in February, 1878, went to the store of plaintiff Phillips, and other places where the goods were, at Kalamazoo, in the Western District, took possession of the goods, boxed and shipped them to Jackson, in the Eastern District, where this action was afterward commenced.

Upon the trial a number of questions were raised as to the regularity and validity of the bankruptcy proceedings, and as to the right of the marshal, under this warrant, to seize goods in the hands of a third person claimed to have been purchased previous to the commencement of the bankruptcy proceedings. The view taken by the court was favorable to the defendant upon all but one point, viz., the right and authority of the defendant to go out of his district, and make the seizure in question at Kalamazoo, and upon this question the court held he had no such authority, and the offer of the provisional warrant, under which the seizure was claimed to have been made, was rejected.

Other questions were afterward raised and decided against the defendant; but as they all depended and turned upon the ruling already made, they become immaterial.

In the brief submitted by counsel for plaintiff in error, it is conceded that under Section 787, p. 147, Rev. Stat. of U. S., which prescribes the duties of marshals, that the authority there conferred is to execute throughout their district all lawful pre-

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cepts directed to them and issued under the authority of the United States.

This it is claimed is but the general authority, and is not intended to point out what may or may not be done by him in special cases. It is not claimed by counsel that this section conferred any authority to make the seizure in question. The claim made is that Congress has power to authorize the marshal, as messenger of the Bankrupt Court, to execute its process anywhere in the United States; that Congress has in this respect the same power that the Legislature of a State has to say that a sheriff may serve process of a Circuit Court outside of the county from which the process issues. Counsel does not claim that Congress has in express terms conferred any such authority, but rather that such authority follows as a necessary and legal implication from other powers expressly conferred; that in order to fully carry out the provisions of the Bankrupt Act, and in order to protect and preserve the property of the bankrupt for the assignee, it is necessary that the marshal should have this authority.

I cannot concur with counsel in this view that such authority will be implied in order to protect the property for the assignee. Section 5046 prescribes what property of the bankrupt shall vest in the assignee, and it is declared that property conveyed by the bankrupt in fraud of his creditors shall at once vest in the assignee, and the assignee may commence and maintain an action for such property, and is not confined to the district in which he was appointed in so doing. To give the marshal the power claimed for him would enable him to follow property which it was claimed had been by the bankrupt sold in fraud of his creditors, all over the United States, to seize it and carry it into the district where the bankrupt resided, and the bankruptcy proceedings were pending. This would require the claimant to follow the property if he desired to protect his title thereto, and submit to the jurisdiction of a court, at an expense and loss ruinous even in case of success. If it could unerringly be said that all sales claimed to have been so made were fraudulent in fact, and that the claimant acquired no in-

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terest or rights entitled to protection, there might be less hardship in this view. But the law does not proceed upon any such theory. We have not been referred to any provision in the acts of Congress, or to a judicial construction of any provision, which would protect the officer making the seizure in this case, and in the absence of such he had no such authority. The seizure having been wrongfully made, in a county where the warrant was but waste paper, and wrongfully removed to and detained in Jackson County, the warrant under those circumstances could afford no justification for the detention. The property could not thus be brought within the jurisdiction of the writ. (*Craig v. Grant*, 6 Mich., 447.)

Express authority is given marshals of the United States to transfer, keep and sell property outside their districts, in like manner as if the property were within the same. (Rev. Stat., Sec. 4629, p. 908; see also Sec. 776, p. 145, et seq., where marshals of one district are authorized to perform duties in others.) Other instances may be found where Congress, deeming an enlargement of powers necessary, has conferred the same in express terms. In the absence of any construction by the court of the United States giving marshals the authority claimed in this case, under the Bankrupt Laws, we think it safer and more in accord with well-settled legal principles to hold that they have no such authority.

It follows that the judgment must be affirmed, with costs.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

AUGUST 16, 1878.

A claim of the landlord for rent, for which, by the laws of the State, he had a lien on goods which have been seized by the marshal, is a preferred claim so far as the proceeds of such goods will go.

A claim by a landlord for use and occupation of premises by the marshal, for keeping and storing the goods, and costs on reference to adjust the amount of claim, are costs of administration, to be paid in full if the assets are sufficient; if not, to be paid *pro rata* with all other expenses of administration of the same class.

In re Hoagland.

Costs of a claimant upon a reference to have the claim declared and enforced are to be paid out of the balance remaining after payment of all the expenses of administration.

The assignee cannot pay a claim for use and occupation of premises without an order of the court, and without ascertaining whether the assets are sufficient to discharge all the expenses of administration of the same class.

In re CHARLES D. HOAGLAND.

F. M. Scott, for petitioner.

E. H. Lewis, for assignee.

Mr. ———, for marshal.

CHOATE, J.—The bankrupt having a stock of goods upon premises in New Jersey, on which there was a lien by the laws of New Jersey for the rent of the premises, the goods were taken by the marshal and sold, bringing five hundred and fifty-eight dollars and thirty-five cents. The marshal also sold other goods belonging to the bankrupt, the proceeds of which were four hundred and eighty-four dollars and thirty-four cents. He paid over to the assignee after his appointment these two sums, less his bill for fees and expenses, amounting to four hundred and four dollars and fifty-nine cents, as adjusted by the register, and the sum of two hundred dollars, retained on the ground that he was liable to be sued by the New Jersey landlord for taking the goods from his premises without discharging the lien for rent. The amount actually paid over to the assignee was four hundred and thirty-eight dollars and ten cents.

Upon the application of the New Jersey landlord, her claim for rent down to the commencement of bankruptcy proceedings has been adjusted at two hundred and twenty-five dollars, and her costs upon the reference, amounting to fifty-eight dollars and fifteen cents, were ordered to be paid her. The same landlord also has a claim for use and occupation of the premises by the marshal after commencement of the bankruptcy proceedings, which has been adjusted at one hundred and twelve dollars.

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Out of the four hundred and thirty-eight dollars and ten cents received by the assignee, he has paid, by order of the court, the costs of the petitioning creditors, ninety-one dollars and seventy cents; and the bill of his counsel for legal services, one hundred and twenty-five dollars; and for a claim made for use and occupation of premises in New York, occupied by the marshal for keeping the goods, one hundred and fifty dollars; leaving only seventy-four dollars and forty cents in his hands, subject to the assignee's claim for commissions, twenty-one dollars and ninety cents.

The claim of the New Jersey landlord, for two hundred and twenty-five dollars, was clearly a preferred claim, so far as the proceeds of the goods on which the landlord had a lien for it will go, and should have been paid out of those proceeds in preference to any costs of administration. The marshal and the assignee have still in their hands such proceeds, sufficient to discharge this claim; and in this respect an order should be made, conformably to the report of the register, that the marshal pay over the two hundred dollars retained by him, and the assignee the further sum of twenty-five dollars out of the proceeds of said goods in discharge of said claim. The other claims of the New Jersey landlord, one hundred and twelve dollars, for use and occupation, as to which no claim of a lien seems to be made, and the costs allowed her, fifty-eight dollars and fifteen cents, are costs of administration, to be paid in full if the assets are sufficient; if not, to be paid in part ratably with all other expenses of administration of the same class. The same is true of the claim for use and occupation of the premises in New York, if there be such; but it has never been properly adjusted, and its payment without an order of the court, and without ascertaining whether the assets were sufficient to discharge all the expenses of administration of the same class, was improper, and the report of the register charging this sum back to the assignee is correct, reserving the right to him to apply to have the claim adjusted, and a proportionate part of it allowed to him upon an adjustment of all the costs and expenses of administration.

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The assignee has also paid to his counsel one hundred and twenty-five dollars.

This payment is allowed by the register in his report, and it is not now contradicted.

As to the costs of the New Jersey landlord upon this reference, stated in the report to be thirty-eight dollars and fifty cents, it seems doubtful if there are assets enough to pay them.

The costs of this reference, to have her claim declared and enforced, should be paid to her, provided there are assets enough after payment of all the costs and expenses of administration. But if the assets are not sufficient for this purpose, I see no propriety in allowing her costs. I see no occasion to allow counsel fees to the marshal, and I do not think there are any funds properly applicable to such a purpose. Let an order be entered directing the payment of the two hundred and twenty-five dollars to the petitioner Thayer, and charging claim of the assignee with one hundred and fifty dollars, paid for use and occupation by the marshal, saving his right to apply to the court for an order adjusting the amount that was due, if any, and for the allowance of such part of the sum actually due therefor, as shall be shown to have been properly paid by him to the party duly entitled to the same, ratably with other similar costs of administration, if any.

Let it also be referred to the register to take proof of all sums due for the costs and expenses of administration, and upon the coming in of the report that any of the parties be at liberty to apply for further relief.

SUPREME COURT—MISSISSIPPI

APRIL, 1877.

Decrees enrolled against a debtor are not liens upon property purchased by him, while insolvent, in the name of his wife; but a court of equity will pursue for the benefit of creditors the means thus invested, and the lien in equity attaches on filing the bill.

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A creditor cannot obtain an equitable lien on the property interests of his debtor by a suit brought after the latter has been declared a bankrupt. Where a debtor had, while insolvent, invested his means in the purchase of property, and taken the conveyances in the name of his wife, and was afterward adjudicated a bankrupt, *Held*, that the State court had no jurisdiction of a suit brought by a creditor to set aside such conveyances and appropriate the proceeds of the property to the payment of his debt. Such rights and interests vest in the assignee in bankruptcy, and he is a necessary party to the suit.

L. A. WINTERS et al. v. W. C. CLAIBORNE et al.

THE facts appear fully in the opinion.

Nugent & Mc Willie, for the plaintiffs in error.

1. The decrees sought to be enforced, which were mere personal decrees for so much money, were not liens *per se*, nor did they become such by subsequent enrollment. (Code, 1871, §§ 830, 1263; Acts 1876, p. 193.)

2. If liens *per se*, or duly enrolled, still they are not operative on the land in controversy. (*Carlisle v. Tindall*, 49 Miss., 229.)

3. In the absence of a lien, the State court is without jurisdiction. (*Allen v. Montgomery*, 10 N. B. R., 503, 48 Miss., 101; Bump on Bankruptcy (9th ed.), 210, 211.)

4. Even admitting that the liens existed, they were not of a character to confer jurisdiction on the State court. (*Davis v. Anderson*, 6 N. B. R., 145; *Jones v. Leach*, 1 N. B. R., 595; *Pennington v. Sale*, 1 N. B. R., 572.)

5. The character of the debt as fiduciary does not give the State court jurisdiction.

Campbell & Anderson, on the same side.

1. The bill does not show a case within the statute of frauds, it not being a conveyance from the debtor; and the complainants fail to trace by proof the funds of the debtor into the property sought to be condemned. (*Edmonson v. Meacham*, 50 Miss., 34.)

2. It was error to sustain the demurrer of the complainants

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to the defendants' plea of bankruptcy properly pleaded. (*Gibson v. Green*, 45 Miss., 209.)

3. This bill was filed pending the bankruptcy of L. A. Winters. That a State court has no jurisdiction to protect a creditor whose debtor is in bankruptcy, is not an open question in this State. (*Allen v. Montgomery*, 10 N. B. R., 503, 48 Miss., 101; *Stevens v. Durrett*, 49 Miss., 411.) When a debtor goes into bankruptcy his legal existence is destroyed, so far as the State courts are concerned. The jurisdiction of his person and property is in the Bankrupt Court, where creditors must go. Upon the filing of a petition, the property of the petitioner, as well that in possession as that conveyed in fraud, vests absolutely in the assignee for the benefit of all the creditors, except in cases where creditors have a recognized lien under the State laws. In this case these creditors had no lien by virtue of their decrees, because judgments and decrees are a lien only on the property of the defendant after enrollment. (Code, 1871, § 830; Bump on Bankruptcy, 174, 175, 367, 460, 462, notes, 476; Bump on Fraudulent Conveyances, 519.)

Butt & Scarborough, for the defendants in error.

1. The court did not err in sustaining the demurrer to the plea setting up bankruptcy. (1.) The facts charged in the bill and admitted by the plea, showing that the liability of Winters, on which the decrees were based, was of a fiduciary character, bring the case within the exception in the Bankrupt Act. (U. S. St. of 1867, §§ 32, 33, 35; *Halliburton v. Carter*, 10 N. B. R., 359, 55 Mo., 435.) (2.) The plea left unanswered the charge of fraud, which is the *gravamen* of the bill. (Story's Eq., Pl., §§ 693, 694.) (3.) It was bad for want of certainty. (Gould's Pl., Ch. 3, § 58, Ch. 5, §§ 66, 144.) (4.) A release in bankruptcy is a personal privilege. Congress may create rights and remedies within constitutional limits; but, where invoked, those rights and remedies must be pursued according to the forms of law.

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2. The discharge in bankruptcy of the debtor was not a defence to this bill. The Bankrupt Court had not jurisdiction to release a liability of this character, unless the appellees had proved their claim and accepted a *pro rata* share. (*Chapman v. Forsyth*, 2 How., 202.) A discharge without jurisdiction is void. (*In re Penn.*, 3 N. B. R., 582, 4 Ben., 99.) And this fatal defect may be shown in any court where the discharge is sought to be pleaded. (*In re Goodfellow*, 3 N. B. R., 452; *In re Kimball*, 2 N. B. R., 204; *In re Rosenberg*, 2 N. B. R., 236; *In re Clarke*, 2 N. B. R., 110.)

3. The lien creditor, however, preserves his remedy, notwithstanding the discharge. (*Gibson v. Green*, 45 Miss., 209.) The assignee in bankruptcy having taken no action with reference to the land, the State court has jurisdiction to make the lien available. (*Reed v. Bullington*, 11 N. B. R., 408, 49 Miss., 223; *Bush v. Cooper*, 26 Miss., 599.)

4. The plea must allege that the debt was provable under the Bankrupt Act. This plea fails so to allege. (*Hayes v. Flowers*, 25 Miss., 169.)

5. Counsel then reviewed the case of *Allen v. Montgomery* (10 N. B. R., 503, 48 Miss., 101), contending that it had been misapprehended by adverse counsel, and was in no way analogous to the case before the court.

6. One having a lien upon property fraudulently conveyed by a bankrupt may prosecute a suit to enforce it, which was instituted before the commencement of proceedings in bankruptcy, even though the discharge is pleaded in bar. (*Payne v. Able*, 4 N. B. R., 220.) An injunction will be dissolved when the bankrupt claims that the property belongs to his wife, as in this case, and the assignee asserts no claim, and no general creditor is injured by it. (*In re Scott*, 2 B. R., 443.) In fact, it is only by injunction that a proceeding of this character can be stopped.

Frank Johnston, on the same side.

1. The objection made by the plea did not raise a question

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as to the jurisdiction of the court. It only set up the discharge of Winters. The idea is that the discharge operated as the personal release of Winters, and is therefore fatal to the suit.

2. Where a creditor of a bankrupt has a valid and effectual lien by judgment of a State court, the State court has jurisdiction and power to enforce such lien. (1.) This was true under the Act of 1841. (*Savage v. Best*, 3 How., 111; *Norton v. Boyd*, Id., 426; *Peck v. Jenness*, 7 How., 612; *Russell v. Cheatham*, 8 S. & M., 703; *Bush v. Cooper*, 26 Miss., 599; *Talbert v. Melton*, 9 S. & M., 9; *Bruner v. Sherley*, 27 Miss., 407; *Reed v. Bullington*, 11 N. B. R., 408, 49 Miss., 223.) (2.) No essential change, so far as this matter is concerned, has been made by the Act of 1867. (3.) Accordingly, it has been held by courts whose decisions are entitled to great consideration, that the State courts can enforce liens, although the debtor has become a bankrupt. (*Marston v. Stickney*, 55 N. H., 383; *Cole v. Duncan*, 58 Ill., 176; *Fehley v. Barr*, 66 Penn. St., 196; *Biddle's Appeal*, 9 N. B. R., 44, 68 Penn. St., 13; *Clark v. Binniger*, 3 N. B. R., 518; *Sharman v. Howell*, 40 Ga., 257; *Douglass v. St. Louis*, 56 Mo., 388; *Munson v. Boston, &c., Railroad*, 14 N. B. R., 173, 120 Mass., 81; *Ray v. Wight*, 14 N. B. R., 563, 119 Mass., 426; *Clifton v. Foster*, 3 N. B. R., 656; *Eyster v. Gaff*, 13 N. B. R., 546, 91 U. S., 521; *Reed v. Bullington*, 11 N. B. R., 408, 49 Miss., 223.)

3. The counsel then reviewed the authorities cited by opposing counsel, and replied at length to the points made by them.

SIMRALL, C. J.—The complainants framed their bill *primarily* on the theory that L. A. Winters, one of the defendants, was a debtor to them severally, by personal decrees obtained against him as guardian and as surviving executor, the decrees having been rendered in 1873; that executions on these decrees, which had been duly enrolled in the Chancery Court, had been returned *nulla bona*; that L. A. Winters had invested his money and means in the purchase of the several parcels of land sought

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to be subjected to the decrees, and had had the conveyances made to his wife, with the intent to hinder, delay, and defraud the complainants in the recovery of their respective debts; and that the decrees were a lien on the lands. The relief prayed was that these conveyances might be set aside, and the property sold to satisfy the debts. There was also a prayer for general relief.

The complainants have misconceived their rights in supposing that their decrees are liens on the lands alleged to have been fraudulently conveyed. This is so, whether the decrees were properly enrolled or not—a point on which much argument has been expended. The several conveyances alleged to be fraudulent were not made by the debtor, L. A. Winters. The title to the property was not in him at all. It may be true, therefore, that his money paid for the land; yet, as he was not a fraudulent grantor, the case does not come within the statute of frauds. But because his means were thus invested, a court of equity would pursue them for the benefit of creditors, not upon any idea that the decrees were liens on the land, but because it was a shift and device to hide and conceal his means from his creditors. The grantees under the deeds would be esteemed as trustees for the creditors. (*Carlisle v. Tindall*, 49 Miss., 229, 232, 235.) Under the prayer for general relief such redress may be afforded as would be warranted by the case stated in the bill, if sustained at the final hearing.

The defendants pleaded, in abatement of the suit, that before its institution, on Jan. 20, 1874, L. A. Winters was adjudged a bankrupt, and held his protection certificate, and therefore pray judgment whether it behooves them to make any other or further answer thereto. This plea was demurred to on various grounds. Those chiefly relied upon are, "that no adjudication of the Bankrupt Court can protect or discharge L. A. Winters from the liabilities charged in the bill;" and "because the rights of the complainants and the liabilities of the defendants are not within the act of Congress or the jurisdiction of the Bankrupt Court." Subsequently, in their answers, the defendants relied upon the final discharge of L. A.

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Winters, which was filed as evidence in the cause. The discharge was dated March 25, 1875. The bill was filed Aug. 10, 1874.

What effect do these proceedings in bankruptcy have on this suit? The complainants claim that their debts are of a fiduciary character, and that the protection certificate and final discharge do not absolve their debtor; and that, having liens on the real estate, they may pursue their remedy in the State court. They refer to *Reed v. Bullington* (11 N. B. R., 408, 49 Miss., 223), and cases there cited, for authority so to do. That case holds that a judgment lien acquired before an adjudication of bankruptcy is protected in its advantages and privileges by the Bankrupt Law of 1867, and that the creditor may proceed to satisfaction in the State court. But, as already remarked, these creditors have *no lien* on the lands. The exact extent of their equity is to subject this property, because embodied in it, so to speak, is the money of their debtor. That interest is not vendible on execution. But for that reason a court of equity, after an exhaustion of legal remedy, applies it as equitable assets to the creditor's demand.

A debtor cannot invest in property for the benefit of his wife and children, or either, to the prejudice of his creditors. Such purchases are advancements merely, and, being voluntary, are fraudulent as to existing creditors.

We are satisfied, from the testimony, that such was the character of the several conveyances vesting the property in Mrs. Winters, and, under our law, would be void as to existing creditors; and such were the complainants. The thirty-third Section of the Bankrupt Law, among other things, declares "That no debt created . . . while acting in any fiduciary character shall be discharged" by proceedings in bankruptcy; "but the debt may be proved, and the dividend thereon shall be a payment on account of said debt." These creditors, although their respective debts were unabsolved by the discharge, could share in the assets of the bankrupt. It becomes important, therefore, to ascertain what property, or interests in property, passed to Winters' assignee. He was declared a bankrupt Jan. 20, 1874, as averred in the plea.

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Under the Bankrupt Law all interests in property which are valuable to creditors pass to the assignee, who takes such interests for the creditors, and may invoke any remedy which they might employ, but for the bankruptcy, to convert such interests into money. The remedy extends to property fraudulently conveyed, and to fraudulent investments in the name of another. If the bankrupt fraudulently invests in stocks, after the commencement of proceedings in bankruptcy, money which he had before, the assignee may recover it. (Bump on Bankruptcy, 553.) Surely he could recover in like circumstances where the purchase was made before such proceedings were begun. We have no doubt, therefore, that the right to reach and subject the property embraced in these conveyances was as fully in the assignee as it was in existing creditors, if there had been no bankruptcy.

This reduces the matter to this proposition, as to the property and interests in property vested in L. A. Winters' assignee, as of Jan. 20, 1874, several months before this bill was filed: Can these complainants, because they were fiduciary creditors pending the bankruptcy proceedings, appropriate this property to themselves exclusively? The other creditors existing at the time of the conveyances were equally entitled to share with them. If the Chancery Court, having no other parties before it, must appropriate the proceeds of the property to pay the complainants' claims, although there may be other creditors equally entitled with themselves to share in the fund, that would break in upon the prominent feature of the Bankrupt Law, namely, an equal distribution of the bankrupt's estate among all the creditors.

The fiduciary creditor stands on the same footing with other creditors, except that he is unaffected by the discharge. He may prove his debt and share in the distribution, but has no exclusive or superior advantages in the assets over other creditors. It is quite evident that an ordinary creditor cannot sue in the State court, pending bankrupt proceedings, and have a decree appropriating property fraudulently conveyed, or in which the bankrupt has made a fraudulent investment, exclu-

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sively to his debt. As we have seen, such rights and interests vest in the assignee for the creditors, and the assignee is a necessary party in that suit—necessary, because the fund ought to go into his hands for distribution.

In *Eyster v. Gaff* (13 N. B. R., 546, 91 U. S., 521), the mortgagee had brought his bill against the mortgagor to foreclose *before* the latter was adjudged a bankrupt; and it was held that the State court was not ousted of jurisdiction by the subsequent bankruptcy, but might decree between the parties, unless the assignee came in and was made a party. He acquired title by assignment *pendente lite*, and was subject to the operation of that principle.

We do not think that the bankruptcy of L. A. Winters necessarily drew to the District Court of the United States all contestations about his estate. A mortgage might have been foreclosed in the State court. So the assignee might have sued in that court to subject his real estate for creditors; or, if he had declined, perhaps creditors entitled to share in the fund might have made him a defendant.

The principle which lies at the foundation of this suit, and stands as an insuperable obstacle in the way of relief to the complainants, is, that they have no lien on the lands out of which they seek satisfaction of the decrees. We have thought it sufficient to demonstrate, by reference to the allegations of the bill, that the title never was in L. A. Winters, who therefore was not a fraudulent grantor within the statute of frauds; and that, for that reason, there could be no legal lien; and have not thought it necessary to consider whether the enrollment of the decree in the Chancery Court was a compliance with the statute regulating enrollments of judgments and decrees. Neither have the complainants a lien in equity on the lands, treating them as equitable assets only to be reached in chancery. They have performed one of the conditions upon which that court interposes, viz., the establishment of their debts by decrees, and the return of *nihil* on final process. The lien in equity attaches on filing the bill.

But the complainants did not institute this suit until several

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months after L. A. Winters, their debtor, had been adjudged a bankrupt. It will hardly be contended that a creditor can obtain an equitable lien on the property interests of the bankrupt by a suit brought after he has been declared a bankrupt. The Bankrupt Law preserves only those liens which existed before and at the time of the bankruptcy. The only suit that can be rightfully brought by a creditor after that occurs is to enforce a pre-existing lien, as a lien by mortgage or judgment. To grant relief on this theory would be to allow the creditors of the bankrupt, without lien, legal or equitable, at the date of the bankruptcy, to acquire an equitable lien by suit in chancery, which would give them an advantage over other creditors not intended by the Bankrupt Law, and in contravention of its whole policy. After bankruptcy had been declared, creditors without the privities and privileges of antecedent liens are confined to the Bankrupt Court for the proof of their debts and also for satisfaction.

To demur to a plea is an unwarrantable innovation in chancery practice. The mode of testing the sufficiency of the plea in law was to set it down for hearing. The demurrer, though irregular, had the effect of obtaining the opinion of the court on the plea. The plea presented the question whether, on account of the bankruptcy of L. A. Winters, the court would further take cognizance of the case.

If the foregoing reasoning is sound, it leads to the conclusion that the complainants could not be relieved, as specially prayed, nor are they entitled to any other relief on the case made by the pleadings and proof.

Decree reversed, and bill dismissed.

In re Vanderhoef et al.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

AUGUST 29, 1878.

A petition by one partner against his copartner omitted to state the residence of such copartner. *Held*, That the omission might be supplied by amendment.

In re NATHANIEL S. W. VANDERHOEF and JOHN P. BEATTY.

W. B. Hornblower, for motion.

B. F. Forster, *contra*.

CHOATE J.—This is a petition by one partner against his copartner.

The petitioner is described as “of the City, County, and State of New York.”

The petition alleges that the petitioner and his copartner Beatty “have been for the last four months copartners, carrying on business in the city of New York.”

There is no averment as to the residence of Beatty.

Beatty appeared upon the return day of the order to show cause, and proceedings have been instituted for a composition. At the first meeting in composition certain creditors appeared and had noted on the record their objections to the jurisdiction of the court that it is not averred that the debtors reside in the United States, and that the debts exceeding three hundred dollars, which it is averred that the debtors owe, are debts provable in bankruptcy.

The debtors now join in a motion that the petitioner be allowed to amend his petition in the particulars complained of.

It is insisted on the part of the opposing creditors that the court, not having got jurisdiction of the case by reason of the want of proper averments in the petition, showing jurisdiction, the amendment cannot be allowed. But the authorities are clear that if the facts are such as sustain the jurisdiction, such

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necessary averments may be supplied by amendment. (*Jackson v. Ashton*, 10 Peters., 480.)

The question whether the averment as to the debts is defective is not passed upon.

Motion granted.

SUPREME COURT—CALIFORNIA.

DECEMBER 9, 1878.

Where a creditor whose claim is secured by mortgage has proved such claim in the bankruptcy proceedings, and the Bankrupt Court has made an order, upon application of a prior lienor, permitting the latter to sell the premises and directing that the proceeds thereof, beyond the sum admitted to be due on such prior lien, abide the further order of the court upon hearing between the claimants of the fund, a State Court has no jurisdiction, after such sale, of a suit to foreclose the mortgage.

SAMUEL W. LEVY v. JOHN C. HAAKE et al.

THIS action was brought by the second mortgagee of property of a bankrupt, to assert his lien upon the mortgaged premises, against the first lien-holder, after the property had passed out of the bankrupt's estate, by a sale, or pretended sale, made under the first lien. The facts appear fully in the opinion.

Pringle & Hayne, attorneys for plaintiff and appellant.

Cowles & Drown, Bartlett & Pratt, and *George Barstow*, attorneys for defendants and respondents.

McKINSTRY, J.—In March, 1868, Haake and wife conveyed certain real estate, called in the record the "homestead," to Burr and Dean, trustees, to secure defendant, the Savings and Loan Society, the payment of his promissory note for two thousand five hundred dollars, and all further indebtedness of said Haake to the society during the continuance of the trust, not exceeding four thousand dollars. In April, 1870, Haake and

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wife mortgaged the same premises to plaintiff, to secure the sum of four thousand dollars then loaned by plaintiff to them. When plaintiff was about to advance his four thousand dollars to Haake he inquired of Burr and of the society how much indebtedness of the said Haake to the society was secured by the deed of trust, but Burr and the society refused to give any information in that behalf. Haake informed plaintiff that there was no other indebtedness so secured except upon the said promissory note of two thousand five hundred dollars, and that there was then only one thousand four hundred dollars due on said note. Plaintiff had no notice or information to the contrary. On the 10th day of November, A.D. 1871, the plaintiff tendered to Burr and the society the sum of two thousand dollars in payment of what was then unpaid, secured by the deed of trust: but they refused to accept the same, and alleged that other moneys were due and secured. No other moneys, except the said two thousand dollars, were in fact due and secured as aforesaid. On the 14th day of February, 1871, Haake was adjudged a bankrupt by the District Court of the United States. The Savings and Loan Society proved its claim and also another claim, secured in like manner upon another lot, against the bankrupt's estate—the two amounting in the aggregate to thirteen thousand six hundred and twenty-eight dollars, of which ten thousand seven hundred and eighty-one dollars was secured on the real estate above-mentioned, and the whole sum on another tract known as the Steuart Street lot, and afterwards made application to the said District Court to be allowed to proceed under the deeds of trust to make sale of the two tracts of land. The District Court upon a hearing of said application made the following order: "Ordered and decreed that the said Savings and Loan Society have leave to proceed with a sale in accordance with said deeds of trust; that the said lot of land on Steuart Street be first sold, and the proceeds applied to the payment of the indebtedness aforesaid; and that after such sale and the appropriation of the proceeds, the said homestead lot be then sold, and that the proceeds of the sale of said homestead lot, after payment of the sum of two thousand dol-

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lars tendered by Levy (the plaintiff) to said society, abide the further order of the said District Court, to be made upon hearing between the said Levy (plaintiff) and the said society." (*Transcript*, folios 31-32.)

The foregoing facts are set forth in the complaint, and it is further alleged that no such hearing as that provided for in the order has ever been had, "because, through the false and fraudulent pretences hereinafter set forth, no real proceeds of sale ever existed, and no actual or valid sale was ever made of the lots of land. That, on the 30th of April, 1873, accounts between Haake and the society were adjusted between them at ten thousand dollars, to be paid by Haake to the society; and it was then agreed between Haake and the society that, upon pretended sales to be made by Burr and Dean, the two lots should be bid off for and on behalf of Haake, to such persons as he, the said Haake, should designate. That thereupon the two lots were offered for sale at auction by Burr and Dean, who, with Haake and the society, caused the Steuart Street lot to be bid off and assigned to one Weissich at the price of six thousand three hundred dollars, and the homestead lot to be assigned to the defendant Peterson at the price of four thousand five hundred dollars. That plaintiff had no actual notice of the time of the sale. That the defendant Peterson had notice of all the premises, and after such notice advanced the said sum of four thousand five hundred dollars to Haake, paying the same to the society on his account. That the Steuart Street lot is of the value of eight thousand five hundred dollars, and the homestead lot of the value of seven thousand five hundred dollars. That by the tender of the two thousand dollars to the Savings and Loan Society, all the lien and claim of the society against the homestead lot was discharged, and the society had no right to make any sale." The *prayer* is to subject the lot to plaintiff's mortgage, without any personal judgment against Haake and wife; and if Peterson be in fact a purchaser in good faith, without notice, for judgment against Burr, Dean and the society, for the value of the lot over and above two thousand dollars.

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The defendants severally demurred to the complaints on the grounds that the State Court had no jurisdiction of the subject of the action, and that the complaint does not state a cause of action. The demurrers were sustained and plaintiff appeals.

We may assume from the terms of the order, and because the contrary does not appear from the complaint, that plaintiff proved his claim against the estate of the bankrupt, and submitted it to the jurisdiction of the District Court of the United States as a Court of Bankruptcy.

“The jurisdiction of the courts of bankruptcy extends to all cases and controversies arising between the bankrupt and any creditor or creditors who claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties; and to the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors; and to all acts, matters, and things to be done under and in virtue of the bankruptcy until the final distribution and settlement of the estate of the bankrupt and the close of the proceedings in bankruptcy.” (Bump’s Bankruptcy, 207.)

It is not denied by appellant that the Bankruptcy Court had power to make the order recited in the complaint, and the power must be conceded. Nor can it be doubted that the Bankruptcy Court also had power to enforce the due execution of its order, to prevent any abuse under color of it, and to set aside any fraudulent practice carried into effect under pretense of obedience to it.

Inasmuch as plaintiff proved his claim in the Bankruptcy Court, it must be presumed (nothing appearing to the contrary) that it was proved and he was admitted as a creditor in the manner, and with the conditions required by the Bankrupt Law. By Section 5075 of that law it is provided: “When a creditor has a mortgage or pledge of real or personal property of the bankrupt, he shall be admitted as a creditor only for the

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balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, *or by a sale thereof to be made in such manner as the court shall direct*, or the creditor may release and convey his claim to the assignee upon such property, and be admitted to prove his whole debt. . . . If the property be not *so sold* or released and delivered, the creditor shall not be allowed to prove any part of his debt."

Here, by an order in proceedings to which plaintiff was a party, provision was made for the sale of the property under the supervision and subject to the control of the Court in Bankruptcy.

It further appears by allegations in the complaint that there now awaits the order of the District Court of the United States the sum of two thousand five hundred dollars (the proceeds of the sale of the homestead lot in excess of the sum of two thousand dollars), to which, by the terms of the order recited, the plaintiff may assert his right in that court. It is difficult to understand the reasoning which would authorize him to abandon the bankruptcy proceedings, and retire himself without the scope and binding obligation of the order while the execution thereof is *in fieri*. From the very nature of the jurisdiction which has thus attached it must be exclusive, and the circumstances present a different case from the ordinary prosecution in the State Courts of a claim provable in the Bankrupt Court.

The defendant Peterson, by becoming a purchaser at the sale under the direction of the Bankruptcy Court, made himself a party to any proceedings in that court with respect to the sale. For aught that appears in the complaint, the plaintiff may, if he is able to make a proper showing to entitle him to any relief, obtain an order from that court setting aside the sale, and subjecting the homestead lot, or both lots, to a resale.

Judgment affirmed.

Lazear v. Porter, Assignee, etc.

SUPREME COURT—PENNSYLVANIA.

JANUARY 6, 1879.

A sale of lands of a bankrupt by the assignee does not divest the dower of the bankrupt's wife.

CHARLOTTE C. LAZEAR v. W. D. PORTER, Assignee, &c., of S. B. W. GILL.

AMICABLE action of assumpsit by W. D. Porter, assignee in bankruptcy of S. B. W. Gill, against Charlotte C. Lazear.

In November, 1877, S. B. W. Gill was duly adjudged a bankrupt by the District Court of the United States for the Western District of Pennsylvania, on creditors' petition, and plaintiff was duly appointed assignee of his estate.

In May, 1878, in pursuance of an order of the District Court, plaintiff sold at public auction to defendant a certain lot of ground in the city of Pittsburg for four hundred and sixty-five dollars cash, subject to the lien of a mortgage for two thousand five hundred and fifty dollars. It was directed in the order of sale, and so stated in the advertisements, that all other liens and encumbrances should be discharged by said sale.

The said bankrupt at the time of the commencement of these proceedings in bankruptcy had a wife who is still living, and who, it is alleged, claims to be entitled to a dower interest in said real estate, insisting that the same was not divested by the sale.

The sale having been confirmed absolutely by the District Court, the assignee executed and tendered a deed for the premises to the defendant, and demanded payment of the purchase-money. Defendant refused pay in consequence of the aforesaid claim of dower, alleging that the same being an encumbrance thereon she was not bound under the terms of sale to accept and pay for the property. Whereupon plaintiff brought this suit to recover said purchase-money.

It was submitted that "if the court should be of opinion

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that the right of dower of the bankrupt's wife aforesaid was divested by the bankruptcy proceedings and sale aforesaid, then judgment to be entered in favor of the plaintiff, and against the defendant above named, for the above sum of four hundred and sixty-five dollars with interest from the date of said sale and costs; otherwise judgment to be entered for the defendant for costs; either party reserving the right to sue out a writ of error therein.

The court entered judgment on the case stated for the plaintiff. Defendant took this writ, assigning for error the entry of said judgment.

Thos. C. Lazear, for plaintiff in error.

An assignment by one in insolvent circumstances of his lands to trustees for the payment of debts will not bar the wife's right of dower. (*Keller v. Michael*, 2 Yeates, 300; *Eberle v. Fisher*, 1 Harris, 526; *Helfrich v. Obermyer*, 3 Id., 113.)

The only circumstance distinguishing those cases in principle from this one is the fact that in the latter the sale was made by order of court. In a case precisely like the present in the United States District Court for the Eastern District of Pennsylvania this fact was held to make no difference. (*In re Angier*, 4 N. B. R., 619.)

W. D. Porter, contra.

The general principle that a judicial sale in this State will bar the wife's right of dower will not be questioned. This was a sale of property of which the District Court had, through its officers, taken possession, not by virtue of any conveyance made by the debtor, as is the case of an assignment by an insolvent to trustees for the payment of debts, but by virtue of a decree of the court adjudging the owner an involuntary bankrupt. The sale was made under an order of the court establishing its terms and conditions, and requiring a report to be

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made to the court. It was public, and upon report to the court was confirmed. What element of a judicial sale is lacking?

[AGNEW, C. J.—How far does the Act of Congress give power to divest dower?]

A bankrupt sale is a judicial sale and will divest liens.

[AGNEW, C. J.—As far as the law authorizes. But dower is not a lien, it is an estate].

In the case of *Worcester v. Clark* (2 Grant, 84), WOODWARD, J., delivering the opinion of the court, said: "On the general principles long recognized in Pennsylvania, that lands are assets for payment of debts and that dower is barred by sheriff's sale in virtue of either a judgment or mortgage executed by the husband alone, I should have no difficulty in holding, that a sale in pursuance of a decree in bankruptcy would also bar dower, were it not for the third proviso to the 2d section of the Act of Congress of August 19, 1841, establishing a uniform system of bankruptcy. That proviso is in these words: 'That nothing in this Act contained shall be construed to annul, destroy, or impair any lawful rights of married women or minors, or any liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the States, respectively, and which are not inconsistent with the 2d and 5th sections of this Act.' The question on this record is whether a married woman's interest in her husband's lands is saved by this proviso." The court held that it was. No such proviso occurs in the Bankrupt Act of 1867, or its supplement of 1874, and therefore such a sale under these Acts must bar dower.

The case *In re Angier* (4 N. B. R., 619) is not authority in this court. It was a motion to set aside a sale by the assignee, a matter entirely within the discretion of the court, and not subject to appeal. An examination of the cases cited and relied on in that case will show that they sustain no such principle as that sought to be established.

Land becomes a chattel for the payment of debts when the law makes it assets for that purpose, in which case all derivative

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interests are extinguished. A judgment against the husband alone, or a mortgage in which the wife does not join, binds the land of the husband, and a sale thereon bars the wife's right of dower. (*Scott v. Croasdale*, 1 Yeates, 75, 2 Dall., 127; *Directors of the Poor v. Royer*, 7 Wright, 146.)

When a man dies the Orphans' Court takes charge of his estate, and the law of Pennsylvania makes his land assets for the payment of his debts, and a sale for that purpose bars dower. (*Mitchell v. Mitchell*, 8 Barr, 126; *Helfrich v. Obermyer*, 3 Harr., 113.)

Now for what reason founded on law can it be held that dower is not divested by a sale made by order of a Court in Bankruptcy, and under its direction and control, while it is held that dower is divested by a sale under an order of the Orphans' Court, or a testamentary power for payment of debts?

TRUNKY, J.—The question presented is, Does a sale of the lands of a bankrupt by the assignee divest the dower of the bankrupt's wife?

By operation of law the title of the bankrupt's real estate is vested in the assignee from the date of the commencement of the proceedings in bankruptcy. (Rev. Stat. U. S., Sec. 5044.) The assignee shall sell the unincumbered real estate on such terms as he thinks most for the interest of the creditors. (Id., Sec. 5062.) He shall have authority under the direction of the court to redeem or discharge any mortgage or lien upon the real estate, or to sell the same, subject to such mortgage or lien. (Id., Sec. 5066.) On application of any party in interest the court shall have complete supervisory power over such sales, including the power to set aside the same and order a resale. (Act of U. S., June 22, 1874, Sec. 4.)

In Pennsylvania an insolvent debtor under arrest and imprisonment to procure his discharge shall execute an assignment of all his estate to trustees nominated by his creditors, and appointed by the court. (Act 1836, Purd. Dig. 779, pl. 22.) The trustees shall be deemed vested with all the estate of the insolvent at the time of filing his petition, subject to all

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liens. (Id., 782, pl. 42.) They shall convert the estate into cash and make distribution among the creditors. (Id., 780, pl. 32.) The property of the insolvent vests in the trustees by operation of law, not by virtue of the assignment. (*Ruby v. Glenn*, 5 Watts, 77.)

The salient points, touching the question in hand, of the bankrupt law and insolvent debtor Act, have been noted the better to observe the similarity of the title which passes to the assignee in the one and the trustee in the other, a title created by operation of law in each, in trust for creditors. The entire estate of the bankrupt is transmitted, so of the insolvent. The assignee is subject to the power and direction of the court, and so is the trustee. In each the estate is to be converted into money for payment of debts, and the accounts are subject to examination of the respective courts. Nothing is said in either statute of the incipient estate of the bankrupt's or insolvent's wife. The Revised Act of 1836 was a re-enactment of prior statutes of like tenor relative to insolvents. At an early day it was held that the *quasi* judicial proceedings for disposition of insolvents' estates did not defeat the right of dower. (*Keller v. Michael*, 2 Yeates, 300.) At a later day the same doctrine was held in *Eberle v. Fisher* (1 Har., 526), when the court said: "In 1822 our insolvent laws required the assignment to be made when this unfortunate debtor was in custody. He must so make it to obtain his discharge. His creditors designated and the court appointed the trustee. The interest which his assignee had was precisely his interest and no more. He sells his effects, real, personal, and mixed. He collects his debts, and he divides the fund according to law among the creditors. If a surplus, he returns it to the debtor. The wife is not named in our insolvent laws, and if the insolvent has real estate, which is sold by the trustee, and she survives her husband, she is entitled to dower in that estate." By parity of reasoning the purchaser from an assignee in bankruptcy takes subject to the bankrupt's wife's right of dower. So held the learned and able Judge of the U. S. D. C. for the Eastern District of Pennsylvania, in *Re Angier* (4 N. B. R., 619).

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“Of course,” as said by the defendant in error, “the general principle that a judicial sale in this State will bar the wife’s dower will not be questioned.” Nor will the principles held in *Directors of the Poor v. Royer* (7 Wright, 146). Nor will we say that the very foundations of those principles are that the debts are liens at and immediately before the seizure and sale. We are not convinced that an assignee’s sale is within the rule. We see no substantial distinction between it and a sale by trustee under our statute. Hence we wholly dissent from the dictum in *Worcester v. Clark* (2 Grant, 84), that “on general principles long recognized in Pennsylvania, that lands are assets for payment of debts, and that dower is barred by a sheriff’s sale in virtue of either a judgment or mortgage, executed by the husband alone, I should have no difficulty in holding that a sale in pursuance of a decision in bankruptcy would also bar dower, were it not for the third proviso to the second Section of the Act of Congress of 19th August, 1841.” Dower is a legal, an equitable, and a moral right. It is favored in a high degree by law, and, next to life and liberty, held sacred. (*Kennedy v. Nedrow*, 1 Dal., 415.) A widow’s right of dower commences with her marriage; it is held so sacred a right that no judgment, recognizance, mortgage, or any other incumbrance whatever, made by the husband after the marriage, can, at common law, affect her right of dower; even the king’s debt cannot affect her. (*Graff v. Smith*, Id., 481.) The only modification of these principles, that we have suffered, is in treating the rights of creditors as paramount, and permitting them through a judicial sale to bar dower; a policy often questioned and which is not to be extended beyond established limits. (*Worcester v. Clark, supra.*)

That policy, from any principle of analogy, should not be extended a whit farther. It has been carried too far, and has too often divested estates of women, incident though they be to the marital relation, when no equitable principle so required. Nothing should be taken to prejudice a wife’s estate by mere inference. A statute ought not to be interpreted as authorizing a sale of the husband’s land, freed from dower, unless such

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is its clear intendment. Were the meaning of the Bankrupt Law, and the effect of a sale of the bankrupt's land, as to dower, doubtful, the conclusion must be that the wife's estate is not divested.

Judgment reversed, and judgment is now entered upon the case stated for defendant for costs.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

AUGUST 10, 1878.

The bankrupt entered into a contract with one S., by which he undertook to carry on the butchering business for S. as his agent and salesman. The contract provided that the "offal, feet, and the commission on hides and the usual slaughter-house perquisites" were to go to S., and the bankrupt was to receive, in lieu of wages, all he could make over and above the current price of cattle bought after deducting all expenses. It was also provided that the bankrupt should account daily with S., and pay over to him all moneys received, until S. was fully reimbursed for the stock and expenses. *Held*, That the agreement did not create a partnership.

In order to bar a discharge on the ground that the bankrupt swore falsely in the affidavit accompanying his schedules that he was indebted to a creditor named therein, or that he did not disclose to the assignee that the claim was false and fictitious, it must appear that he knew that the claim was false and fictitious.

The bankrupt kept proper books of account with customers, but it was conceded that he kept no books showing the transactions between himself and S. *Held*, That his dealings with S. were just as much a part of his business within the meaning of the statute as his dealings with his customers.

In re ISAAC BLUMENTHAL.

THE facts appear fully in the opinion.

Learned & Warren, for opposing creditors.

G. H. Yeaman, for bankrupt.

CHOATE, J.—This is an application for the discharge of the bankrupt. It is opposed on three grounds. (1) The swearing falsely in the affidavit accompanying his schedules that he was indebted to one Samuels in the sum of four thousand two hundred dollars, and (2) not disclosing the fact to his assignee that

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Samuels' claim, which was proved, was false and fictitious, and (3) that being a trader he did not keep proper books of account. The first and second charges are not sustained. The relation between Samuels and the bankrupt is claimed by the opposing creditors to have been that of partners. The question depends upon the construction of a written agreement by which the bankrupt undertook to carry on the butchering business for Samuels at his (Samuels) establishment, as expressed in the contract, "as his agent and salesman to purchase cattle, slaughter them and sell the beef, and to do all acts necessary in reference thereto." The contract provided that "the offal, feet, and the commission on hides, and the usual slaughter-house perquisites," were to go to Samuels, and that the bankrupt was to receive, "in lieu of wages or other compensation, all he can make over and above the current price of cattle bought after deducting all expenses." It also provided that the bankrupt should account daily with Samuels, and pay over to him all the moneys received by him until Samuels was fully reimbursed for the stock and expenses. Samuels' claim was for a balance of money due to him under this contract. The agreement did not create a partnership. There was no sharing in the profits.

Moreover, so far as these objections are concerned, it must appear that the bankrupt knew that the claim was false and fictitious. It is clear that there is no proof that the bankrupt knew or believed that Samuels had no right to prove his debt as a creditor.

The contract itself is strong evidence that both parties understood that the bankrupt was an agent and not a partner of Samuels.

As to the books kept by the bankrupt, the evidence shows that so far as the accounts between him and his customers were concerned, though unskilfully kept, they were sufficient to show the true state of those accounts. But under the agreement between him and Samuels he was constantly receiving and paying moneys from and to Samuels, and it was conceded on the argument that he kept no books showing these transactions, relying on Samuels to keep these accounts. It is insisted on

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behalf of the bankrupt that this was not his business, but Samuels' business.

I see no ground for this claim however. The statute requiring proper books of account to be kept is for the prevention of fraud, and designed to secure to all parties dealing with a merchant or trader books of account from which the state of his business in case of bankruptcy can be truly ascertained.

It is just as important that the moneys received by him from time to time, and his disposition of those moneys should appear, as that his current accounts with those who deal with him as customers should appear.

If this is not done, his creditors have not the requisite information as to his assets and liabilities. The bankrupt's dealings with Samuels were just as much a part of his business, within the meaning of the statute, as his dealings with his customers. (See *In re Winsor*, 16 N. B. R., 152; *In re Archibrown*, 12 Id., 17). The rule withholding a discharge in default of proper books of account, though it may work hardship in individual cases, is no doubt wholesome in its general effect, and in this case I feel compelled to sustain this objection.

Discharge refused.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

APRIL 1, 1878.

A charterer of a vessel, having purchased supplies of a material man upon the credit of the vessel, afterward went into bankruptcy and proposed a composition with his creditors, which was accepted. *Held*, That the lien of the material man was not thereby discharged, even though he voted in favor of accepting the composition.

Money furnished to a vessel is not a lien, unless it be furnished for the purpose of paying claims which would themselves be liens.

THE "HOME."

On libel in Admiralty for supplies.

During the year 1875 libellant, who was a shipchandler at Port Huron, claimed to have furnished the tug "Home" sup-

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plies and money to the amount of five hundred and seventy-eight dollars and eighteen cents, upon the order of Dale & Moore, the charterers of the tug; that the articles were furnished, with the exception of four items, hereafter mentioned. That they were necessary, and were furnished upon the credit of the tug, is admitted. It was insisted, however, in defence, that, shortly after the supplies were furnished, Dale & Moore were adjudicated bankrupts in the District Court for the Northern District of Illinois; that a composition with their creditors was proposed by them, and received the assent of the requisite number and amount; that the resolution of composition was signed by the libellant; that the composition was subsequently carried out, and that it operated as a discharge of the libellant's claim. It seems that libellant had claims against Dale & Moore to the amount of over five thousand dollars, but that for the bill, which is the basis of this suit, libellant, in his proof of debt, claimed expressly a lien upon the tug, and did not waive the same in fact, whatever might be considered the legal effect of his joining in the composition. The case was defended by a mortgagee of the tug, holding under the legal owners.

Atkinson & Atkinson, for libellants.

D. C. Holbrook, for claimant.

BROWN, J.—Under General Admiralty Rule 12, a person furnishing supplies to a vessel has a triple security for the payment of his claim. 1. The owner, a charterer being regarded as the owner *pro hac vice*; 2. the master; 3. the vessel itself. A failure to collect from either does not impair his remedy against the others. He may pursue them successively until his entire debt is paid. (*The "Paul Boggs,"* 1 Sprague, 369; *The "Highlander,"* Id., 510; *The "Harriett,"* Id., 33; *Granger v. The Judge of the Wayne Co. Ct.*, 27 Mich., 406; *The "Kalorama,"* 10 Wall., 204; *Harmer v. Bell*, 22 Eng. L. & E., 62; *Toby v. Brown*, 11 Ark., 308; *The "Bengal,"* Swabey, 468; *The "John & Mary,"* Id., 471; *Nelson v. Couch*, 15 C. B., N. S., 99.) Had the supplies in this case been furnished

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upon the order of the owners, there would be reason for insisting that the claim against the owner and the lien upon his property was but a single debt, of which the lien was but an incident, and that the release of one might operate as the discharge of the other; but there are in fact three independent though not joint debtors in this case, viz.: the charterer, the vessel, and the master, and the release of one does not impair the remedy against the others. The case does not differ from that of a debt against the maker of a note, secured by an indorsement, in which case it is now settled that the act of a creditor consenting to a composition does not discharge the surety. If a principal debtor becomes insolvent or procures a discharge in bankruptcy, clearly a surety is not released; so if the principal is discharged by his creditors, the effect upon the surety is the same, and the fact that the plaintiff assented to the composition is declared immaterial. (*Guild v. Butler*, 16 N. B. R., 347, 122 Mass., 498; *Browne v. Carr*, 2 Russ., 600; 5 Moore and Paine, 497; *Megrath v. Gray*, L. R., 9 C. P., 218; *Ellis v. Wilmot*, L. R., 10 Exch., 10; *Ex parte Jacobs*, L. R., 10 Ch., 211.) It is true that Sec. 17 of the Act of June 22, 1874, authorizing compositions, provides that creditors whose debts are fully secured shall not be entitled to vote upon or to sign such resolution, without first relinquishing such security for the benefit of the estate; but the word "secured" here is confined to securities which, if released, would revert to the assignee. It does not apply to personal security, or security upon property which does not belong to the bankrupts. (*In re Spades*, 13 N. B. R., 72.) Even if the creditor be secured by a lien upon the property of the bankrupt, he may either release such lien and unite in the composition for his whole debt, or have his security valued and come in for the difference. (*In re Lytle & Co.*, 14 N. B. R., 457; *Paret v.*

his case with regard to the in-
ing his debt, it is dispelled by
disclaiming any intention of
omposition here must be held

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only to discharge the debt of the libellant against the charterers, and to have no effect upon his security.

But the two items of forty-two dollars and eighty-one cents to J. R. Butler, and of thirty-seven dollars and fifty-five cents to F. & A. Myers, must be disallowed. They are charged in the account as money furnished the vessel. But it nowhere appears whether the bills which were paid by this money were themselves liens upon the vessel. The stipulation admits that the payment of these bills was made by the libellant after the goods covered by the bills had been delivered to the tug; but it does not appear what was the nature of the bills, or whether they could have been made the basis of a proceeding *in rem*.

There is no proof whatever regarding the two items of fifty-three dollars and twelve cents and eighty-three dollars and sixty-eight cents, which must also be disallowed. For the residue, libellant is entitled to a decree, after deducting the amount received in the composition proceeding.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

AUGUST 30, 1878.

The general rules and orders made by the Supreme Court under authority of the Bankrupt Law were designed to systematize and facilitate the practice of the Bankrupt Courts, and so far as they apply must be strictly followed; but they were not designed to nor do they create or declare the rights of creditors in the estates of bankrupts, still less do they abrogate and annul those rights.

The receiver of a corporation, having presented proof of a claim against the bankrupt with no deposition in support thereof, as required by G. O. 34, the claim was re-examined and held valid, and leave given to the receiver to amend by producing the deposition of an officer of the corporation. The receiver applied to the proper officer, who refused to make the deposition. On the re-examination of the claim the treasurer of the corporation was examined under oath, and his deposition was a part of the case on which the decision sustaining the claim was made. *Held*, That under the circumstances the receiver should be permitted to file the deposition

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of the treasurer, made upon the reexamination, with the same force and effect as if originally made as a deposition under G. O., 34.

In re ARCHIBALD BAXTER and DUNCAN C. RALSTON.

THE facts appear fully in the opinion.

Abbott Brothers, for trustee.

Kelly & Macrae, for receiver.

CHOATE, J.—The Receiver of the International Packing Co. having presented proof of a claim against the bankrupts, which was disputed by the trustee, the claim has been re-examined and held to be a valid and provable claim.

One objection made by the trustee was that no deposition in support of the claim was presented with the proof conformably to General Order No. 34. In the order sustaining the claim, leave was given to the receiver to amend his proofs by producing the deposition of an officer of the corporation, the International Packing Company, to whose rights the receiver has succeeded. It now appears by the petition of the receiver that he has applied to the proper officer of the corporation, who refuses to make the necessary deposition.

In the course of the proceedings upon the re-examination of the claim, the treasurer of the corporation was examined under oath, and his deposition then taken was part of the case upon which the decision sustaining the claim was made.

The ground on which the officer now refuses to make the deposition does not appear. It is suggested by the counsel for the trustee that it is because he cannot truthfully make it.

A motion is now made by the receiver that the deposition of the Treasurer of the corporation, made on the re-examination of the claim, be filed, with the proof of claim, with the same force and effect as if originally made as a deposition conformably to General Order No. 34.

It is insisted on behalf of the trustee that this cannot be

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done; that the court cannot dispense with the requirements of the General Order in this respect.

The motion must be granted.

There can be no question of the power of the court, where it is impossible to comply with this requirement of the General Order to relieve the creditor so that he can obtain the benefit of the dividend to which he is entitled. The general rules and orders made by the Supreme Court, under authority of the Bankrupt Law, are designed to systematize and facilitate the practice of the Bankrupt Courts, and so far as they apply must be strictly followed.

But they were not designed to create or declare, nor do they create and declare the rights of creditors in the estate of bankrupts; still less do they abrogate and annul those rights. Many cases may arise where it is impossible to procure the deposition of the assignor to the claim. He may be out of the jurisdiction, or dead, or insane, with no legal representative within the jurisdiction competent to act for him in this matter.

He may not be able truthfully and in good faith to make the deposition, as is suggested in this case. It would be a great stretch of authority to attempt to coerce him to swear to what he does not believe to be true.

In all such cases to hold that the General Order was peremptory and without exception, and absolutely excluded the proof, would be to hold that it deprives the creditor without just cause of his proper share in the bankrupt's estate, and divides it among the other creditors.

In the particular case the leave to file the deposition of the officer of the corporation was given because it did not appear that it could not be obtained, and this permission seemed to meet this technical objection. Probably it was necessary because the proceedings taken amount to an adjudication of the court upon the creditor's claim, and it would seem that after such an adjudication in the very cause itself formal proof is unnecessary.

It appears now to be impossible to comply with the General Order in this respect. Motion granted.

In re Whitney.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

JANUARY 9, 1879.

A stay of a proceeding, subsequent to final judgment, for the purpose of putting in motion the remedy of arrest which is reserved to the creditor, is not allowable under §§ 5106, 5107, U. S. R. S.

Prior to the commencement of the proceedings in bankruptcy, a surrogate's decree was docketed against the bankrupt for the payment of moneys misappropriated by him as administrator, and an appeal taken from a decision of the surrogate refusing an application for a commitment of the bankrupt for failure to pay. Upon such appeal, pending the bankruptcy proceedings, the decision of the surrogate was reversed, and the proceedings remitted to him to enforce the proper remedy against the person of the bankrupt. *Held*, That the proceedings could not be stayed under Section 5106 so as to prevent an application to the surrogate for a commitment

In re OLIVER B. WHITNEY.

THE facts appear sufficiently in the opinion.

Bernard & Fiero, for motion.

Chas. A. Fowler, for bankrupt.

CHOATE, J.—This is a motion to vacate or modify a stay of proceedings.

The creditor, Townsend, is the owner, by assignment, of certain claims against the bankrupt for moneys received by him as administrator, and which he has misappropriated, for the payment of which a final decree was entered by the surrogate, which decree has been docketed and an execution issued thereon returned unsatisfied. The surrogate, on the 7th of May, 1878, refused the petitioner's application for a commitment of the bankrupt for failure to pay said moneys, on the ground that the claim was merged in a judgment recovered by her against the administrator and his sureties on his administrator's bond. She appealed to the General Term of the Supreme Court, and on the 19th of September, 1878, the decision of the surrogate was reversed, and the proceeding was remitted to the surrogate for the enforcement of the proper remedy against the person

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of the bankrupt. Thereupon the bankrupt appealed to the Court of Appeals, where the judgment of the Supreme Court was affirmed. The debtor's petition in bankruptcy was filed August 31, 1878, pending the first appeal. On the 13th of December, 1878, on affidavit by the bankrupt that the proceeding sought to be stayed was on a provable debt, this stay was granted.

The proceedings before the surrogate prior to the application for a commitment were equivalent to a final judgment for these moneys, and what the judgment creditor now seeks to do is to obtain from the surrogate the order for the commitment of the bankrupt which the surrogate before refused, and to proceed on that to his arrest. If the order of arrest had been actually procured before the bankruptcy, and were now in force, the arrest would not be enjoined or discharged, because the debt was clearly one, as the State Supreme Court and Court of Appeals have held, created by the defalcation of the bankrupt while acting in a fiduciary character, and therefore not dischargeable in bankruptcy. The finding of the State court thereon is conclusive in this court. It has been held that whether a debt is dischargeable or not, proceedings will be stayed pending the application for a discharge, if the debt is provable (*In re Rosenberg*, 2 N. B. R., 236), and this claim is clearly provable. But the question now raised is, whether, under Section 5106, the proceedings should be stayed, so as to prevent an application to the surrogate for a commitment. That section forbids the carrying-out of any suit *to final judgment* pending the question of the discharge. It seems that where the suit has already proceeded to *final judgment* before the bankruptcy, this section does not authorize the stay of proceedings to enforce that judgment against the person of the bankrupt by arrest, where the arrest is not forbidden by Section 5107, and I think that a fair construction of the two sections does not allow a stay of a proceeding, subsequent to final judgment, for the purpose of putting in motion the remedy of arrest which is reserved to the creditor. Proceedings subsequent to final judgment, which would operate to affect the prop-

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erty of the bankrupt, are stayed upon a different principle, and to prevent interference with his estate to which creditors through the assignee are entitled. (See *In re Vogel*, 2 N. B. R., 427.)

Stay modified so that it shall not prevent proceedings upon the basis of the surrogate's decree for commitment and arrest of the bankrupt.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

JANUARY 6, 1879.

The Bankrupt Court has power to order a bankrupt to pay over to the assignee sums which, apparently, are in his hands.

In re CALVIN HOW and FRANK G. HOW.

LOWELL, J.—This was a petition by the assignees in bankruptcy of Calvin How and Frank G. How, alleging that they have in their possession at the present time certain promissory notes and certain sums of money, which were part of their assets, and should have been paid over to the petitioners, and praying relief.

The petition was referred to Mr. Sherman, the register having charge of the case, who has reported that the notes mentioned in the petition have been collected by Calvin How, and, upon the whole evidence, he finds in the hands of said Calvin, unaccounted for, the sum of four thousand nine hundred and ninety-five dollars and eighty-six cents, and in the hands of Frank G. How, in like manner, the sum of nine hundred dollars.

Upon a review of the evidence, I agree with the register that those sums are severally chargeable to the bankrupts as reported.

It was agreed by both parties, as I understood, that the question whether the bankrupts had, in fact, lost or spent the money or part of it, since they received it, or since the bank-

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ruptcy, if received before, was not fully examined or intended to be examined by the register. And the argument before me did not touch the point of the power of the court to punish a bankrupt, actually poor; or how such power, if possessed, should be exercised; and whether anything like a poor debtor's oath could be administered to them. All that is asked at this time is an order on the bankrupts, severally, to pay over the sums which, apparently, are in their hands.

I have no doubt of the power of the court to pass such an order. A debtor who becomes bankrupt submits himself, or is by law submitted, to the summary jurisdiction of the court. It is not necessary that the assignee should sue him in order to obtain the assets. His position is somewhat like that of an attorney, or other officer of the court, or of an accountant of the court. The cases on this point are, I believe, entirely uniform. (*In re Dresser*, 3 N. B. R., 557; *In re Speyer*, 6 Ib., 255; *In re Kempner*, 6 Ib., 521; *In re Peltasohn*, 16 Ib., 265.) The case of *In re Salkey & Gerson* (11 Ib., 423, 516) is also somewhat analogous to, though not identical with this, because that was a question of the disclosure required of a bankrupt.

I shall pass the order:

That the bankrupts pay to the assignees the sums found by the register to be due from them, respectively, in thirty days from this 6th January, 1879.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

JANUARY 2, 1879.

By the terms of a resolution of composition the bankrupts were authorized to continue their business in the firm name under the direction of a committee. The committee wrote to one C., who afterwards sold goods to the firm, that it was understood that all debts incurred after the composition should be paid in full before any payment should be made on the old indebtedness, but that the committee were not in any event to be personally liable. The business was carried on for a year, and resulted disastrously, the original assets being much diminished during that time,

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and no new assets acquired. *Held*, That C. was not entitled to payment in full in preference to the old creditors.

In re BRIGHTMAN et al. Ex parte COX et al.

A PETITION in bankruptcy was filed against L. Brightman & Sons, March 22, 1876. On the 15th of April, 1876, resolutions for composition, which had been duly passed and accepted, were ordered to be recorded; the offer was as follows: "We, L. Brightman & Sons, hereby propose to our creditors a composition of one hundred per cent. in money, to be paid in three equal instalments, in one, two, and three years, respectively, after the recording of the resolution accepting such composition, the same to be secured by our notes, and by a conveyance of our partnership property, to such person or persons as may be chosen by our creditors at this meeting, in trust for all our creditors, the business to be carried on under the direction of a committee to be chosen by our creditors at this meeting." Rufus G. Norris was chosen trustee, and a part of the joint property, such as real estate and vessels, was transferred to him. John W. Fairbanks, Henry Dennis, and Benjamin F. Brightman were appointed a committee, as provided in the resolution.

The business was that of catching the fish called "porgies," and manufacturing them into oil and other marketable products, for which the firm had facilities and vessels and other appliances at Tiverton, in Rhode Island, and at Bristol, in Maine. After the composition was made, the business was carried on for a year by B. F. Brightman, one of the committee and one of the bankrupts, in the same way and under the same firm name as before. Large debts were contracted, and many of them were paid out of sales and receipts, but some of them remained unpaid when the year expired. At this time the first instalment was not paid, and the partners were adjudged bankrupt, and assignees were chosen.

This was a petition by A. F. Cox and Son, for payment in full for goods bought by the firm during the year after the composition was accepted. Before selling the goods, the petition-

In re Brightman et al. Ex parte Cox et al.

ers received a letter from Dennis and Brightman, two of the committee, in which they said, amongst other things: "Under the order of the court, Messrs. L. Brightman & Sons are fully authorized to carry on their business under our direction, and it is understood that all debts incurred by them after March 22, 1876, are to be paid in full before any payment is made on the old indebtedness; but Messrs. Fairbanks and Dennis are not in any event to be personally responsible for any of said debts, the limit of their liability being to direct the business according to the composition."

The business was disastrous, and the assets originally held by the bankrupts were much diminished during the year, and nothing came to the hands of the assignees which had been acquired during that time.

W. F. Putnam, for the petitioners, cited: *Tucker v. Hernaman* (4 DeG., M. & G., 395); *Ex parte Ford* (L. R., 1 Ch. D., 521); *Ex parte Charlton* (L. R., 6 Ch. D., 45).

T. F. Nutter, for the assignees.

LOWELL, J.—The facts present a case of great hardship for the petitioners. The old creditors of L. Brightman & Sons permitted the firm to trade, and it was necessary that they should contract some debts in carrying on the business. If these necessary debts had been paid, as many of them were, out of the receipts, or even out of the capital, I do not know that any one could complain. It is hard that chance, or the neglect or whim of the debtors, or even the exhaustion of the available assets, should have the effect of putting some of the new creditors in the position which the petitioners occupy.

I regret to say that I cannot find the law which will give these new creditors a lien on the old property. If the trustee had been duly authorized to carry on the business, and had contracted proper debts, he would have had a lien for his indemnity, and so of the committee; but the arrangement was that the debtors might pursue their usual business for a year, unless the committee should interpose, and that certain joint

In re Brightman et al. Ex parte Cox et al.

property which would not be sold in the usual course of business—such as vessels—should be put into the hands of a trustee for safe keeping. The answer of the assignees alleges that the separate real estate of L. Brightman was left with the bankrupts to enable them to raise money for the business, and that it was mortgaged for that purpose. This mortgage was paid during the year out of the receipts of the business or of the assets.

The result seems to be that the debtors were to go on as before, and I cannot see that the old creditors impliedly understood that the debts should be paid. Two of the committee wrote to the petitioners that it was understood that the new debts were to be paid in full; but they disclaimed all personal responsibility, and it is admitted that they had no authority to give an equitable lien on the assets, and that they have not effected such a lien by this letter. It must be taken as a statement of what the debtors intended and expected to do.

The cases cited from the English books are not much like this. They hold that while the assignees, under the then existing provisions of the law, were entitled to all the after-acquired property of an undischarged bankrupt, yet if they permitted him to go on and trade as a free man, they would be estopped to claim such newly-acquired property, obtained by trade, against new creditors who had no knowledge of the bankruptcy, and were pressing a remedy by execution or by a fresh bankruptcy against such new property. There must be some *laches* on the part of the assignees, and a concurrent deception of the persons dealing with the bankrupt, to bring about this equity.

Several of the elements of the estoppel are wanting here. None of the assets were acquired in the new trade, nor have the creditors held out the bankrupts as capable of contracting, excepting as the resolutions give them a year in which to pay the first instalment, and as the exact state of matters was fully known to the persons dealing with the bankrupts, the single question is, whether the resolutions bind the old creditors to such a consequence.

In re Kohlman et al.

Now I understand it to be admitted that by the English law, which we have imitated in a large measure, there would be no such right as is here claimed. The cases above referred to were none of them cases of composition, but of trading, for a long time after an ordinary bankruptcy. A letter of license, or a covenant not to sue, appears to be the nearest analogy to a resolution like this. It must be remembered that the mere acceptance of the resolution, with nothing in it about a trustee or a committee, would probably have operated in the same way as these resolutions—that is, as a license to trade for a year. The appointment of these persons was only a precaution intended to keep some control against fraud or recklessness, and does not bind the creditors, or the committee, or the trustee, to the new creditors, and for that reason does not bind the property.

I do not wish to be understood as deciding that the new debts may not be proved *pari passu* with the old debts. This point was not argued, and I can conceive that a question of estoppel might be made with some force in that direction. I believe I have never decided that point, though I may have said something about it.

Petition dismissed without costs.

: ————— :
UNITED STATES DISTRICT COURT—S. D. NEW YORK.

DECEMBER 30, 1878.

Moneys payable under a composition cannot be reached by attachment or their payment obstructed by proceedings of another court, the object of which is to withhold the fund from the creditor entitled thereto for the security of a plaintiff pending the litigation.

Except in a case where the plaintiff in an action against the creditors claims title to or a specific lien upon the fund in question, or has procured the appointment of a receiver who has succeeded to the creditor's title, the Bankrupt Court cannot be asked to suspend or deny the right of the creditor to receive his composition.

A delay in the payment of the composition notes, occasioned by legal or other difficulties, will not *ipso facto* avoid the composition; nor will a failure to pay one of the creditors, according to the terms of the resolu-

In re Kohlsaat et al.

tion, work a forfeiture of the bankrupt's rights under the composition as to those creditors to whom payment has been punctually made.

In re JOHN W. KOHLSAAT et al.

James H. Fay, for motion.

Charles Wehle, opposed.

CHROATE, J.—This is an application for the appointment of a receiver of certain moneys payable to three of the creditors of the alleged bankrupts under a composition which has been confirmed, and for an injunction against the payment of such composition to the creditors. The facts are these :

The firm of J. C. Kohlsaat & Sons owed one Milton, the petitioner, about thirty-four thousand dollars for money lent. The bankrupts, composing the firm of J. C. Kohlsaat's Sons, succeeded to the business of the firm of J. C. Kohlsaat & Sons, and assumed their debts ; among which was this debt to Milton. Milton, claiming to hold the estate of John C. Kohlsaat as collaterally liable for the same debt, notwithstanding the assumption of the debt by the new firm and his assent thereto, has commenced an action in a State court against the two bankrupts as executors of John C. Kohlsaat and against the three creditors of the bankrupt above referred to, who are alleged to be legatees and of the next of kin of John C. Kohlsaat ; and in that suit he alleges that certain notes given by the bankrupts to these three creditors were executed and received for portions of their distribution shares in the estate of said John C. Kohlsaat, or for portions of their legacies under his will, the same having been given to them by the bankrupts in pursuance of the conditions on which the bankrupts took the estate of the said John C. Kohlsaat under his will. These same notes are the claims which these creditors have proved against the bankrupts, and the composition notes for thirty-three and a third per cent. thereof have been given to them in pursuance of the terms of the composition. The complaint prays judgment for an account by these three creditors as legatees and next of kin for all portions of the estate received by them and

In re Kohlsaet et al.

for payment thereof, also for an injunction against the bankrupts to prevent the payment of the composition notes to these creditors until said debt due the plaintiff is paid, and for payment thereof to the plaintiff. Milton, in his affidavit, swears that the fund which in that suit he is secured by injunction will, he believes, be imperilled by the payment of the composition notes to these creditors.

Both Milton and the three creditors have proved their claims, and are entitled as creditors to share in the composition. An application has been made to the State court for the appointment of a receiver, which is undetermined. The first composition notes fall due December 31, 1878. On this case I think the application must be denied.

If it be assumed that Milton has good grounds for claiming that the estate of John C. Kohlsaet is not released by what has taken place, and that he also may in equity treat the composition notes held by these creditors as portions of their distribution shares or legacies under the will of John C. Kohlsaet—questions for the State court in that case exclusively to decide—yet there seems no good reason why this court should actively interfere by a receiver and injunction to aid him in securing his debt as against these legatees or next of kin.

In general, dividends payable by an assignee, and moneys payable under an order of court cannot be reached by attachment, nor can their payment at the time and to the persons designated by the order of the court be prevented by a State Court. (*In re Bridgman*, 2 N. B. R., 252; *Colby v. Coates*, 6 Cush., 558, and cases cited.)

Payments to creditors under a composition resolution are analogous to dividends payable by an assignee, or moneys payable by an order of court. Composition proceedings are another mode of distributing the bankrupt's estate, the bankrupt administering the estate himself instead of an assignee or trustee, and a stipulated percentage being paid instead of the actual result of the liquidation. The court is authorized to enforce the payment of the composition, and the time of payment, which is always fixed in the resolutions, is one of the terms of

In re Kohlsaet et al.

the composition and of the essence of the contract. I think, therefore, the principles which have been established as to dividends apply to compositions, and that moneys payable under a composition cannot be reached by attachment or their payment obstructed by proceedings of another court, the object of which is, like that of an attachment, to withhold the fund from the creditor entitled thereto for the security of a plaintiff pending the litigation. The same reasons forbid this which prevent an attachment. And it is certainly no part of the province of this court to become the stakeholder for parties litigant in a State court, and to aid one of those parties against the other by holding for him a fund out of which he seeks in that litigation to collect his debt, in case he shall recover judgment.

This is, I think, the nature of the relief now sought here. The question whether the plaintiff has made out such a case *prima facie* as to entitle him in equity to the aid of the court for the sequestration or impounding of funds or property for his security, in case he ultimately shall have judgment, is one peculiarly and exclusively for the consideration of the court in which his suit is pending, and depends upon the case he makes—*first*, as to its apparent merits, and, *secondly*, as to the danger of loss in which the fund is placed if such provisional relief is not given. And in this case, while the State court cannot interpose to prevent the carrying out of the terms of the composition, by the payment thereof on the day fixed, to the party then entitled as creditor, or his duly constituted successor in interest, yet that court is competent to give the plaintiff all necessary security and relief, since it may, if a proper case is in its judgment made out, restrain these creditors, upon the receipt of this money, from parting with the same or may appoint a receiver to hold it thereafter, and, pending the litigation and the conversion of the note into money, will not destroy the means of tracing and identifying the fund as a portion of the distribution share of the estate of John C. Kohlsaet, if that character is now impressed on it. If this plaintiff had been so diligent or so fortunate as to have procured the appointment of a receiver of

In re Kohlman et al.

this fund by the State court prior to the time fixed for its payment, such receiver might be regarded as the duly constituted successor of the creditors to whom the composition was originally due, and as such he might be entitled to receive the payment of the composition.

This court is expressly vested with power to enforce the composition; and this seems to include the power to determine which of two parties claiming to be lawfully entitled to the composition is the rightful claimant; and in some cases, where rival claims have been interposed, this court has directed the fund to be paid into the registry of the court to await the determination of such question of ownership, either upon a reference ordered here or upon a suit brought therefor in another court. But in this case the plaintiff neither claims title to nor a specific lien upon the fund in question, nor has he procured the appointment of a receiver who has succeeded to the creditor's title. Except in such a case, this court cannot be asked to suspend or deny the right of the creditor to receive his composition. The statute under which the plaintiff has brought his action, so far as it is an action against these legatees or next of kin, does not authorize the recovery from them of the specific property formerly of the testator or intestate, still in their possession, but only allows a money judgment for the value of what they may have received as such next of kin or legatees. (2 N. Y. Rev. Stat., p. 90, Section 53 [42], p. 451, Sections 23-28.)

I do not give any weight to the apprehension expressed by the learned counsel for these creditors, that, in case the composition notes are not paid to every creditor according to the terms of the composition resolution, and on the very day they become due, the composition is thereby avoided and the original debts revived as to all the creditors, even though the failure to pay one or more of them should be prevented by the restraining order of this court. Such a construction would be quite unreasonable. The statute itself contemplates the possibility that after the composition resolutions are finally confirmed there may be legal or other difficulties to prevent or delay its

In re Blumenthal.

performance, and in such case the court is expressly authorized to set the composition aside. This seems to imply that the court has a discretionary power to deal with such a case, either by setting it aside, or by making such other order in the premises as justice and equity shall require, and that such legal or other difficulties resulting in delay do not *ipso facto* work a revocation. Still less is it to be inferred from the statute that failure to pay one of the creditors will work a forfeiture of the bankrupt's rights under the composition as to those creditors to whom payment shall punctually be made.

Motion denied.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

DECEMBER 28, 1878.

The bankrupt carried on the business of butchering as agent and salesman for one S. under a contract which provided that he should account daily with S. and pay over the moneys received until S. was reimbursed for his outlay. The transactions between the bankrupt and S. were entered daily by the bookkeeper of S. in a passbook, which was kept in the bankrupt's possession. *Held*, That such passbook was one of the bankrupt's books, and a proper book within the meaning of the statute.

In re ISAAC BLUMENTHAL.

Gardner & Goodhart, for bankrupt.

Larned & Warren, contra.

CHOATE, J.—In this case a discharge was refused upon the ground that the bankrupt did not keep proper books of account.*

Upon the argument it had been conceded that the transactions between the bankrupt and Samuels & Co. did not appear upon the bankrupt's books. It was claimed that these transactions were not to be considered a part of the bankrupt's business for the purpose of the requirement of the statute in

* See *ante*, 555.

In re Blumenthal

this respect; but it was held that they were so, and consequently the discharge was refused. Upon a suggestion that the concession made by counsel upon the argument was made under a misapprehension as to the facts, the case was referred back for further proof.

As the debt of Samuels & Co. was necessary to make up the requisite number of creditors assenting to the discharge, and their claim was disputed, it was also referred to the register to take further proof as to their claim, the parties stipulating that so far as it affected the question of discharge the determination should have the same effect as upon proceedings for re-examination of their claim.

The further testimony taken shows that the admission made at the former hearing was a mistake; that the transactions between the bankrupt and Samuels & Co. appear on his books.

One of those books is a small pass-book, produced by him to Samuels & Co. from day to day, in which the bookkeeper of Samuels & Co. entered the transactions as they occurred.

This book was kept in the bankrupt's possession. It was one of his books, and a proper book within the meaning of the statute. Besides, the same transactions appeared in the cash-book up to September 21, 1876, and after that time in the ledger kept by the bankrupt.

As to the claim of Samuels, there is no evidence which overcomes their proof of debt. On the contrary, the testimony both of the bankrupt and the accountant who has been over the books confirms it. Under the agreement between the parties the bankrupt was bound to repay to Samuels & Co. all the moneys received from them for the purchase of cattle. He did not do so, and owes them therefor.

Discharge granted.

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ACT OF BANKRUPTCY.

1. The defective execution of a voluntary assignment for the benefit of creditors does not prevent its being an act of bankruptcy.—*In re Lawrence et al.*, 516.

See CHATTEL MORTGAGE, 1; DISCHARGE, 15.

ACTION.

1. A creditor, whose claim is provable but has not been proved, may prosecute to final judgment an action against the bankrupt, if the assignee does not intervene and no motion for a stay of proceedings is made.—*Holland v. Martin*, 359.

ADJOURNMENT.

See REGISTER, 2.

ADJUDICATION.

1. From the schedules annexed to a petition filed by one partner of a dissolved firm against his copartners for the adjudication of the firm, it appeared that the firm had been dissolved by judicial decree and all its assets transferred to a receiver, and that there were firm debts. *Held*, That the firm could not be adjudicated.—*In re Hopkins v. Carpenter et al.*, 339.
2. The court has jurisdiction, on a voluntary petition for the adjudication of a firm, to entertain and determine the question what persons in fact constitute the firm, and an adjudication based upon the determination of such fact is valid until set aside or reversed.—*In re Griffith & Wundrum*, 510.
3. In 1872 the bankrupts were adjudicated upon a voluntary petition, which alleged that they composed the firm of G. & W. In 1874, in a proceeding in the State court, it was held that one A. was a general partner in said firm, and not a special partner, as he was believed to be at the time the petition was filed. On a petition filed in 1878 to set aside the adjudication, *Held*, that the application should be denied, on the ground that so long an interval had elapsed since the adjudication that rights and interests of other parties had grown up under it and been adapted to it.—*Ibid*.

See INTERVENTION, 1; PARTNERS, 7, 9; REGISTER, 1.

ALIMONY.

1. A claim for alimony, whether the same accrued before or subsequent to the commencement of the proceedings in bankruptcy, is not a provable debt, and proceedings to enforce its payment cannot properly be stayed by the Bankrupt Court.—*In re Lachemeyer*, 270.

AMENDMENT.

1. The provision of the statute allowing amendments to petitions was not intended to allow creditors recklessly and falsely to make and swear to their petition, which they know to be false, and then to have others join in and carry it on.—*In re Keller et al.*, 10.
 2. A petition by one partner against his copartner omitted to state the residence of such copartner. *Held*, That the omission might be supplied by amendment.—*In re Vanderhoef & Beatty*, 543.
- See PARTNERS, 4; SCHEDULE, 1.

APPEAL.

See COMPOSITION, 14.

ARBITRATION.

1. It is not competent for a creditor and the bankrupt to submit to arbitration the question of the amount due to the creditor from the bankrupt's estate.—*In re Ford & Co.*, 426.

ARREST.

1. The Bankrupt Law does not authorize the arrest of the bankrupt in a voluntary proceeding.—*In re Hale*, 335.
- See DISCHARGE, 2; STAY, 5, 6.

ASSETS.

See CONTEMPT, 1,

ASSIGNEE.

1. The right of action given by Section 30 of the Banking Act to recover back usurious interest is a "claim" or "debt" which passes to the assignee in bankruptcy.—*Wright v. First Natl. Bk.*, 87.
2. Powers of revocation and powers of appointment, though they be such as may be exercised by the bankrupt for his own benefit, do not pass to the assignee either by virtue of the assignment or of the adjudication in bankruptcy.—*Jones v. Clifton*, 125.
3. An assignee cannot reclaim money deposited for a special purpose, in which the person holding the deposit has acquired a vested interest.—*Newcomb v. Launtz*, 276.

4. One S., who was a special partner in a firm whose nominal assets exceeded the liabilities by only two-ninths, made a settlement upon his wife of leasehold property and bonds to the amount of one hundred thousand dollars. About this time the firm was dissolved, and S. and one of the members of the old firm formed a new copartnership, furnishing no new capital, and continuing the business as if the old firm still subsisted. Two years later the new firm failed, and was found to be hopelessly insolvent. It did not appear that the wife took any part in bringing about the settlement, or that there was any guilty knowledge on her part in the transaction. She died before the failure, and by her will gave the income of her estate to her husband for life, with remainder to his children, she having none. Her executor sold the leasehold property to one P., who paid therefor partly in cash and partly by mortgage. The cash was loaned by the executor to a firm which afterward failed, and was thereby lost to the estate. In an action by the assignee of the firm to reach the property settled upon the wife, and to subject it to his administration, *Held*, That the settlement was invalid; that the assignee was entitled to possession of the mortgage, but that there could be no money judgment against the estate for the balance of the proceeds of sale of the leasehold property.—*The U. S. Trust Co. v. Sedgewick*, 340.

See ASSIGNMENT FOR CREDITORS, 8; DEPOSITS, 1; DISTRIBUTION, 6; EXEMPTION, 3; FRAUD, 7, 9; JURISDICTION, 2-4; LEASE, 1, 3-6; LIMITATION, 1; NATIONAL BANKS, 1; PLEADINGS, 3.

ASSIGNMENTS FOR CREDITORS.

1. W. assigned his property for the benefit of all his creditors. A few days afterward judgments were entered and enrolled against him. The enrollment, by law of the State, gave liens on the property of W. He filed a petition in voluntary bankruptcy within sixty days from the date of the assignment. *Held*, That the assignment was not void at common law; was only void under the Bankrupt Law as against the assignee, and that the property was not W.'s, but that of the trustee, and no lien existed in favor of the judgment-creditors.—*In re Walker*, 56.
2. *Held further*, That neither of the following facts rendered the deed of assignment void, viz.:
 - 1st. That it was made to a trustee who was the clerk of W.;
 - 2d. That it was made to a trustee of little or no property, but of excellent character, without requiring bond;
 - 3d. That it required a sale of the goods for cash, but permitted a sale on a credit of not exceeding thirty days, if the trustee deemed this best; and
 - 4th. A subsequent proposition of W. to pay a certain amount to his creditors, coupled with a threat of bankruptcy, did not of itself vitiate the deed.—*Ibid*.
3. The trustee was subsequently chosen assignee in bankruptcy. *Held*, That upon the execution of the assignment to him by the register the title became vested in him from the date of the assignment, and this being so, all his acts as trustee, performed in accordance with the deed of assignment, intermediate its date and bankruptcy, must be approved.—*Ibid*.

4. The debtor made a voluntary general assignment for the benefit of creditors. Proceedings in bankruptcy having been commenced against him within three months thereafter, he made a proposal for composition, which was accepted, the resolution providing that upon *payment* of the composition the debtor's property in the hands of the voluntary assignee should be forthwith delivered to the debtor and the said assignee released and discharged from all claims against him on the part of the creditors arising out of his office. No adjudication was had against the debtor. On an application made before the composition notes were payable to remove the voluntary assignee on the ground that he had failed to file a bond, and that without filing such bond he had been selling and disposing of the estate, *Held*, that the assignment was in no way affected by such agreement of the creditors; that the assignee was not thereby relieved of his duty to file a bond, and that if he should do so and then transfer the property to the debtor he would do it upon his own responsibility if the composition was not carried out.—*In re* assignment of Leipziger, 264.
- See ACT OF BANKRUPTCY, 1; COMPOSITION, 29; DISCHARGE, 14, 15.

ATTACHMENT.

1. Where an attachment lien fails in consequence of proceedings in bankruptcy, the attaching creditor is not entitled to have his costs allowed and paid out of the bankrupt's estate, unless it is clearly shown that his design was to employ the attachment in aid of bankruptcy proceedings, and that the creditors generally were benefited thereby.—*In re* Irons & Coon, 95.
 2. When, in an attachment proceeding, a judgment is recovered, and process issues thereon to sell the attached property, its lien relates back to the service of the attachment, and there is then no attachment process in existence upon which Section 5044 can operate.—*Hudson v. Adams*, 102.
 3. The attachment referred to in Section 5044 of the U. S. Revised Statutes is an attachment on *mesne* process. The section does not relate to proceedings on final process. It does not dissolve a lien created by seizure of the debtor's property on execution issued to enforce the judgment of the court.—*Storer et al. v. Haynes*, 354.
 4. Where a creditor commenced suit, and attached goods and chattels of the debtor, and obtained judgment and an order of sale of the attached property, and a petition in bankruptcy was subsequently filed and the debtor adjudged a bankrupt, the bankruptcy proceedings do not invalidate the judgment lien, although no execution or order of sale had been issued on the judgment.—*Shelley et al. v. Elliston*, 375.
 5. The attachment had become merged in the judgment, and Section 5044 of the Bankrupt Act only operates to dissolve attachments *pending* when the bankruptcy proceedings are commenced.—*Ibid*.
- See COMPOSITION, 56; PRIORITY, 1.

ATTORNEY.

1. In 1868 a suit was commenced by one T. against C. and others for the joint benefit of the bankrupt and one W., who had agreed to share in the re-

suits of the litigation and bear its expenses in equal proportions. A judgment was recovered in favor of T., from which an appeal was taken about the time the proceedings in bankruptcy were commenced. The assignee in bankruptcy was substituted in place of the bankrupt, who was a defendant in the suit, and contributed to the payment of counsel fees and expenses until he gave notice that he would pay no more expenses. Afterwards, under an order of the Court, the assignee was permitted to withdraw and assign all his interest in the litigation to W. The judgment was reversed by the General Term and a new trial ordered, and the Court of Appeals affirmed the judgment of the General Term. The counsel having, after the termination of the suit, presented a claim against the assignee for their services before as well as after his substitution, *Held*, That they were only entitled to payment for their services and disbursements after the assignee stipulated to be substituted, and that W., by taking the assignment of the assignee's interest, assumed all its burdens, and has no equity to demand reimbursement from the assignee.—*In re Litchfield*, 347.

BANKRUPT.

1. Where the bankrupt collects moneys belonging to his estate, either before or after the filing of the petition in bankruptcy, and fails to account for the same, he will be compelled to pay such moneys to the assignee.—*In re Ettlinger*, 222.
2. Proceedings of this character may be instituted by summary petition.—*Ibid*.
3. Payment of such moneys after the filing of the petition, for interest on mortgages, will not be allowed unless shown to be for the benefit of the estate.—*Ibid*.
4. A bankrupt, the payee of a negotiable bill or note, who before bankruptcy sells and delivers the same without indorsement, may indorse the same after bankruptcy so that the holder may maintain an action thereon in his own name.—*Hersey v. Elliott*, 358.
5. The Bankrupt Court has power to order a bankrupt to pay over to the assignee sums which, apparently, are in his hands.—*In re How*, 565.

BAR.

See PRACTICE, 7.

BOOKS OF ACCOUNT.

See DISCHARGE, 6, 7, 19, 20.

CHATTEL MORTGAGE.

1. On the 11th of January, 1878, the bankrupt, a druggist, executed a chattel mortgage on all his stock of drugs, etc., constituting his stock in trade, to his father-in-law, to secure him as surety on a note given by the bankrupt. The mortgage was taken with the understanding that the bankrupt was

to go on and sell at retail in the ordinary way, which he accordingly did. On the 20th of May the mortgagee, having become dissatisfied with the way in which the business was being conducted, took possession of the property under the mortgage. On the 4th of June the petition in this case was filed. *Held*, That the mortgage and the seizure of the property thereunder were both acts of bankruptcy, the first as being a fraudulent conveyance, and the second as operating as an unlawful preference.—*In re Foster*, 64.

CIRCUIT COURTS.

See FRAUD, 7 ; INJUNCTION, 5.

COMPOSITION.

1. Defendants, who were indorsers upon a promissory note, filed a voluntary petition before its maturity and proposed a composition at twenty-five cents on the dollar, which was accepted. The holders in no way participated in the proceedings, which were terminated before the note matured. The twenty-five per cent. was tendered to the holders in due time, but was rejected. In an action upon the note after maturity, *Held*, That defendants were liable for the full amount thereof ; that their contingent liability was not affected by the composition.—*Smith v. Krauskopf*, 6.
2. In composition proceedings, when objections are interposed by the minority whose claims will be discharged against their will, it is the duty of the court to examine those objections fully and carefully.—*In re Keiler*, 36.
3. The court will not hesitate to interfere when the debtor has deceived the creditors into a vote which they would not have given had the facts been honestly and fairly before them ; nor to withhold its assent to the composition, if it is satisfied that the proceedings are collusive, although there is only *one* dissenting creditor. But the court must act on evidence, not suspicion.—*Ibid*.
4. Where it appears that the creditors can receive no more than the amount proposed if ordinary administration be had, and there is no adequate proof of collusion, the composition should be confirmed.—*Ibid*.
5. The 17th Section of the Bankrupt Act, passed June 22, 1874, Section 5103 A of the Revised Statutes, providing for the settlement of estates in bankruptcy by composition proceedings, does not, in providing a remedy, operate to repeal the general provisions of the Bankrupt Law ; the section is rather to be construed in harmony with the general principle pervading all bankrupt laws.—*In re Jacobs*, 48.
6. The authority of a Bankrupt Court upon the submission of a resolution in composition proceedings, duly accepted and confirmed by the requisite number of creditors under the provisions of said section, is not limited to the determination of a mathematical result.—*Ibid*.
7. In the absence of fraud, accident, or mistake, the determination of the creditors is final as to the quantum of composition ; but when through preferences, fraudulent under the Bankrupt Act, injustice has clearly been done to the body of creditors, the ancient maxim must apply, "The law would rather tolerate a private loss than a public evil," and

the court will not lend its aid to the relief and discharge of the debtor, and create a precedent for the doing of that which bankrupt laws were devised to prevent.—*Ibid.*

8. A composition in bankruptcy operates as a satisfaction of debts that were fraudulently contracted.—*Bamberg v. Stern*, 74.
9. Proceedings in composition are regularly begun when the petition in bankruptcy alleges facts sufficient to show jurisdiction.—*In re Wronkow & Hogan*, 81.
10. A composition which provides, in addition to an offer in money in deferred payments, that the real estate which the bankruptcy assignee has acquired shall be converted into money for the use of the creditors, is proper.—*Ibid.*
11. Debtors are not required by Section 17 of the Bankruptcy Amendment Act, approved June 23, 1874, to attend any meeting in composition except the first.—*Ibid.*
12. The creditors at the first meeting are to decide as to the sufficiency of the excuse for the absence of the debtor, and their decision should not be disturbed, except for good cause shown.—*Ibid.*
13. While the rights of the minority creditors should be carefully protected against all unreasonable acts of the majority, the judgment of the requisite majority should always be allowed to prevail, unless obtained without sufficient consideration or by some unfairness or undue influence.—*Ibid.*
14. The Appellate Court will not inquire into the question whether the composition is for the best interests of the creditors, unless specific errors in the action of creditors or the court below can be pointed out which, if sustained, would change the judgment.—*Ibid.*
15. The court will refuse to relieve creditors who fail to present their objections at the first meeting in composition, except they make a clear case for equitable interference in their behalf.—*Ibid.*
16. An inadvertent mistake in the amount of a debt, made by a bankrupt in the schedule filed in composition proceedings, will not avoid the composition as to any creditor.—*Beebe v. Pyle*, 163.
17. It matters not to what time interest on a debt is computed, provided the interest on all the debts is computed to the same time.—*Ibid.*
18. On application for a final order of confirmation of a proposed composition, the report of the register must, for the purposes of such application, be taken to be a true and full report of all the proceedings before him. If parties are dissatisfied with it, either because of alleged omission or mistake, they should move promptly to have it referred back for correction. The other party is entitled to have notice of such proposed correction before the motion for confirmation comes on for argument.—*In re Spencer*, 199.
19. If, through accident or design, the notice of the first meeting fails to reach creditors whose presence at the meeting might alter the result of the vote, and the court is satisfied that their failure to attend was owing to the failure of the notice alone, and that their votes would have changed the result, it is proper and right that on their application the meeting, if closed, should be reopened and the vote of each person received and counted; but such relief should be applied for promptly, and one who

lies by until the second meeting has been called and convened cannot then ask to have the first meeting reassembled, unless the delay is excused for sufficient cause.—*Ibid.*

20. When the register has decided as to the right to prove and vote upon a particular claim as between two parties who claim such right, the proper course for the party aggrieved is to apply for an adjournment of the meeting till his right as a creditor can be tested and passed upon by the court before the final vote is taken. He may ask to have the question certified to the court upon the testimony before the register; or, if he desires to produce further evidence, he should ask leave to produce it, and if necessary ask for time. If, however, he submits to the decision, and without farther objection allows the vote to be taken, he cannot ordinarily be allowed to reopen the question at the second meeting, upon consideration of the question whether the requisite majority present at the first meeting have assented to the composition.—*Ibid.*
21. If any party is aggrieved by the rulings of the register on his application for time or opportunity to prove his right to vote or to disprove another claimant's right, it is competent for the court, in order to secure a full and fair vote, to reopen the meeting and adjourn it, and provide for the proper determination of all questions of the right to vote in some suitable way before a final vote is taken, and upon the coming in of the report of the register his rulings on these questions as disclosed by the record are subject to the review of the court for the determination of the question whether the requisite majority of those present have assented to the composition.—*Ibid.*
22. The composition was only two per cent. The largest creditor, without whose vote, if she had been present, it could not have been passed, was strongly opposed to it. Owing to a misdirection of the notice, by accident or design, she was not present to vote. There was also a doubt as to the right of one of the consenting creditors to vote. *Held*, That the composition was not for the best interests of the creditors; that there was a formal but not a real compliance with the requirements of the law as to the consenting majority of creditors.—*Ibid.*
23. A refusal by the register to proceed further with the examination of the debtor without payment of his fees or security, full opportunity having been given to make such payment or deposit security before the closing of the examination, affords no ground upon which a creditor can base an opposition to the recording of a resolution of composition.—*In re Tiff,* 227.
24. So long as the inventory is produced before the register and at all times made accessible to the creditor for the purpose of examining it or the bankrupt in respect to it, the creditor is not prejudiced by a refusal of permission to take a copy thereof.—*Ibid.*
25. Where debtors had excepted to a proof of claim at their composition meeting, and the court allowed the claim, and the creditor voted in favor of the composition, *Held*, On a motion to compel debtors to pay the composition on this debt, that the amount claimed by the creditor in his proof of debt, although accepted by the creditors and the court as the

- true amount due for the purposes of their action in the composition proceedings, does not conclude the debtors, and on this motion they may show, if they can, that it exceeds what they actually owe.—*In re Lissberger*, 230.
26. Fiduciary debts are discharged by a composition in bankruptcy.—*In re Rodger et al.*, 252.
27. A composition in bankruptcy does not become effective so as to discharge the debtor from his debts until the composition notes are paid, and if a note given to a creditor agreeing to the composition is not paid when due he can sue for the original debt and is entitled to his *pro rata* proportion under an assignment for the benefit of creditors, if one has been made.—*In re assignment of Leipziger*, 264.
28. At the meeting of creditors called to take action on a resolution of composition, the register has no authority to require any other person to testify except the debtor.—*In re Dobbins*, 268.
29. A provision of a resolution of composition to the effect that upon the delivery of the composition notes all the property in the hands of a voluntary assignee of the bankrupts shall be delivered to them and the assignee discharged from responsibility is wholly nugatory so far as it purports to affect the assignee's responsibility, or the rights of creditors under the assignment, otherwise than as the confirmation of the composition and release of the creditors' claims by payment of the composition may necessarily affect them.—*In re Hyman*, 299.
30. Confirmation of the resolution of composition does not give the assent of the court to what such provision vainly attempts to effect.—*Ibid.*
31. Confirmation of a resolution containing a provision that the proceedings in bankruptcy may be discontinued at any time after delivery of the notes does not bind the court to allow such discontinuance, unless sufficient grounds therefor are shown to exist when the application is made.—*Ibid.*
32. In composition proceedings, the debtor, though present, may, by a vote of the creditors present, be excused from examination on account of illness.—*In re Wilson & Greig*, 300.
33. The fact that security provided for a composition does not certainly secure the full payment of the composition does not make the composition uncertain.—*Ibid.*
34. The circumstance that there is no security given for the payment of the composition notes is merely one of the facts in the case to be considered with and in the light of all the other facts on the question, whether the composition is for the best interests of all concerned.—*Ibid.*
35. On the question whether, the composition being in other respects fair and just, the debtor should be allowed to keep his property, the principal element is his personal and business character.—*Ibid.*
36. The question as to the time within which, and how rapidly the debtor can pay the composition, is one for the creditors to consider, and their judgment will not be reversed unless valid reasons for so doing are shown.—*Ibid.*
37. Where a resolution of composition provides that it shall be consummated within a limited time or be void, *Held*, That such agreement was not

- absolute, but would be void if not consummated as to *all* of the creditors within the time limited.—*Evans et al. v. Gallantine*, 311.
38. Where, in an action by a creditor upon his original claim, the defendant set up as an answer such composition agreement, and that he had performed such agreement as to plaintiff within the time specified, *Held*, That the answer was insufficient for want of an averment that such agreement was duly consummated as to *all* the creditors.—*Ibid*.
39. Objections to the vote of a creditor upon a resolution of composition, on the ground that his claim is fictitious or invalid, should be made at the first meeting and before the vote is taken ; or, if the facts impeaching its validity are afterwards discovered, application should be promptly made for relief ; such objections cannot be raised for the first time upon a motion for confirmation.—*In re Bloch*, 328.
40. The composition was for twenty-five per cent., payable five cents cash in five days after confirmation, and ten cents at the end of three and six months each from the same date. The resolution provided that upon payment of the five cents the property should revert to the debtor. It appeared that the bankrupts had, with a full knowledge of the wrongful nature of their act, used moneys belonging to a creditor, without his consent, which they had deposited in bank in their own name as a special deposit for him. *Held*, That the arrangement was not judicious nor reasonably safe for the creditors. A person proved once to have misappropriated the funds of another, fully understanding the wrongful character of the act, is unfit to be trustee of property for the benefit of his creditors.—*Ibid*.
41. At a composition meeting only those creditors who prove their claims are competent to engage in or take part in its proceedings.—*In re Keller & Goodhue*, 331.
42. At the second meeting in composition either party may furnish competent testimony, oral or written, on the question whether the composition is for the best interest of all concerned.—*Ibid*.
43. It is competent to produce any creditor and prove by him that he has been induced or biassed to sign the resolution by any false statement, or by any evil practice of the debtor.—*Ibid*.
44. If a claim is disputed on its merits, the register who presides at a composition meeting may examine and pass upon it subject to review by the court. His power is not limited to the postponement of the claim, as in the case of a general meeting of creditors to elect an assignee.—*Ibid*.
45. A creditor who has appeared at any session of the first meeting in composition and taken part in its proceedings, but is not present when the vote is taken, is to be counted as voting against the resolution, unless he has clearly indicated his purpose to withdraw and not to be counted.—*In re Richmond*, 362.
46. Where, by the terms of a resolution of composition, it is provided that the property and books of the bankrupts, which have been theretofore held by an assignee under a voluntary assignment, should be returned to the debtors, creditors who are bound by the composition will be held to have consented to such transfer, and if, by any means, such transfer shall be effected in furtherance of the terms of the resolution, they will not be

- permitted to undo what has thus been done with consent.—*In re Rodger et al.*, 381.
47. A provision in a composition agreement, that the proceedings may be discontinued at any time without notice to the creditors, is to be treated merely as a waiver on the part of creditors of notice of an application to discontinue, and does not bind the court to grant such an application.—*In re The McNab & Harlin Mfg. Co.*, 388.
48. A composition is none the less payable in money because the payment is postponed to a future day.—*Ibid.*
49. The composition was for seventy-five per cent., payable in twelve equal instalments, the first being in three months and the last in three years from the date of confirmation, to be evidenced by the notes of the bankrupt without other security. It was also provided that upon the giving of the notes all the property of the bankrupt should be surrendered to it. It appeared that the president of the bankrupt, who was also its treasurer, had used the funds and credit of the company to a large amount for his own benefit; that, after his defalcation was discovered, he resigned his office as treasurer, but was continued as president; that none of the trustees have manifested any disposition to punish him or to compel him to make restitution, but have settled the matter by taking his stock and crediting him on his account therefor, and by paying the notes outstanding which were either made or indorsed by him in the name of the corporation. *Held*, That the corporation in its managing officers was not of that unquestionable, personal and business character that it would be reasonably safe to trust it for three years, pending the payment of the composition, with the property on which the creditors had a hold, and confirmation was accordingly refused.—*Ibid.*
50. The statute allows any composition which is satisfactory to the requisite majority of the creditors and which is for the best interests of all concerned.—*In re Purcell*, 447.
51. At a first meeting in composition fifteen creditors were assembled, representing seventy thousand and eighty-three dollars and ninety-six cents. A composition of one per cent. was accepted by a vote of eight creditors, representing fifty-six thousand two hundred and seventeen dollars and fifty-two cents. One of those voting in the affirmative was the assignee of an insolvent firm, and voted upon a claim of four thousand one hundred and twenty-seven dollars and fifty-eight cents. The bankrupt had lent his accommodation notes, to the amount of ten thousand dollars, to the firm, who discounted them for their own use, and the notes were proved against the estate by the holders and constituted part of the debts represented at the meeting. *Held*, That the assignee had no interest in the composition and should not be regarded as a creditor who had any voice in its acceptance; that the composition was not approved by the requisite majority within the true meaning of the statute.—*Ibid.*
52. Where a creditor has proved his claim in bankruptcy, voted upon a resolution of composition, and accepted his *pro rata* share in money and promissory notes given in pursuance of said resolution to secure payment of future instalments, he cannot sue upon his original debt in a State court, al-

- though the debtor has made default in payment of one of the instalments.—*Deford et al. v. Hewlett*, 518.
53. It is not a good objection to a composition that the schedules stated the real estate of the debtor as of unknown or uncertain value.—*In re Welles*, 525.
54. Nor is it a good objection that property standing in the name of the bankrupt's wife should have been included in the schedules, and should be deemed the property of the bankrupt, where the facts relating thereto were brought out by the testimony, and considered by the creditors in coming to the conclusion to accept the composition.—*Ibid.*
55. The general objection that the estate could pay more, is not one that will avail unless very clearly made out, and unless the disparity is evident.—*Ibid.*
56. Moneys payable under a composition cannot be reached by attachment or their payment obstructed by proceedings of another court, the object of which is to withhold the fund from the creditor entitled thereto for the security of a plaintiff pending the litigation.—*In re Kohlsaat et al.*, 570.
57. Except in a case where the plaintiff in an action against the creditors claims title to or a specific lien upon the fund in question, or has procured the appointment of a receiver who has succeeded to the creditor's title, the Bankrupt Court cannot be asked to suspend or deny the right of the creditor to receive his composition.—*Ibid.*
58. A delay in the payment of the composition notes, occasioned by legal or other difficulties, will not *ipso facto* avoid the composition; nor will a failure to pay one of the creditors according to the terms of the resolution work a forfeiture of the bankrupt's rights under the composition as to those creditors to whom payment has been punctually made.—*Ibid.*
- See ASSIGNMENT FOR CREDITORS, 4; INJUNCTION, 2, 3, 4; JURISDICTION, 6; LIEN, 9; PRIORITY, 3; SET-OFF, 2.

COMPOUNDING CLAIMS.

1. The bankrupts, prior to the filing of their voluntary petition, paid their attorneys one hundred and fifty dollars, and assigned to them a large amount of uncollected claims, to secure them, as alleged, for services rendered and to be rendered in the bankruptcy proceedings. Some of these claims were afterward collected by the attorneys. An action was commenced against them by the assignee to recover back the moneys paid and the property assigned, on the ground that the same were illegal, fraudulent, and void under the Bankrupt Law. On an application, made by the assignee after issue joined, to compound the claim by accepting from the attorneys the claims still uncollected, and releasing them from all claims on those which they had collected, *Held*, That the case was not a proper one for the compounding of disputed claims under Gen. Order No. 20.—*In re Rowe et al.*, 429.
2. The expense and delay of the litigation, though considerable, does not justify a compromise in a case where public interests and the due administration of the Bankrupt Law require the settlement of the questions of law involved by the judgment of the court.—*Ibid.*

CONSIDERATION.

1. While a promise, made *after* receiving a discharge in bankruptcy, to pay a debt from which the promissor has been discharged is valid, such promise made *before* the discharge has been obtained is without consideration and cannot be enforced.—*Ogden et al. v. Redd*, 317.
See CONTRACT, 1; DISCHARGE, 3, 16.

CONTEMPT.

1. The moment a voluntary petition is filed, all the property of the bankrupt, in possession or in action, which is included in the inventory and schedules, comes into the prehensory power of the court as fully as if it was in the actual and visible presence of the court, and consequently is under its protection and within its exclusive control.—*Byrd v. Harrold et al.*, 433.
2. The bankrupt had given certain mortgages upon his exemption property, in each of which he had waived all his homestead and exemption rights under the State constitution and laws, and under the Bankrupt Act, in and to the property mortgaged, and also his right to a discharge in bankruptcy. The assignee appointed in the voluntary proceedings left the property in the hands of the bankrupt as custodian until he could procure the schedules and proceed to administer the estate. The mortgages were afterwards foreclosed, and the executions therefor levied on the mortgaged property, which had been returned in the schedules. The assignee never had actual possession of the property levied on. *Held*, That the waiver could not be enforced until the property was designated and allotted to the bankrupt by the assignee; that the levy was a positive contempt of the jurisdiction of the court, and was not justified by the ignorance of the mortgagees and the sheriff as to the bankruptcy of the mortgagor and the appointment of the assignee, as they might easily have obtained knowledge of these facts.—*Ibid.*

CONTRACT.

1. An arrangement was entered into between defendant and a committee appointed by the bankrupt corporation, defendant, and the other owners, by which defendant was to furnish the lumber necessary to rebuild a dam owned by them all. Defendant furnished a part of the lumber, placing it where it would be taken for use on his own land, but the dam was not rebuilt. Defendant proved his claim in the bankruptcy proceedings for the bankrupt's share of the purchase-price, but afterwards withdrew it, and neither the bankrupt nor its assignee ever paid anything for the lumber thus furnished or otherwise took possession of it. Subsequently, defendant obtained leave of the assignee to sell it, and promised thereupon to pay him his share of the avails; but after selling the same he refused, on demand made, to pay over plaintiff's share. In an action by the assignee to recover such share as money had and received to his use, *Held*, That it was proper to submit to the jury the question whether anything remained to be done to this lumber by defendant before, under the

contract, it was to be taken and used; that the question whether the title to the lumber passed to the bankrupt, and therefore whether there was a consideration for defendant's promise, depended upon whether anything remained to be done by the seller.—*Gates v. The Winoski Lumber Co.*, 31.

CONVEYANCE

See DISCHARGE, 8.

CORPORATIONS.

1. In the ordinary case of a solvent private corporation there is no liability of the stockholders to pay the capital until an assessment, but in the case of insolvency, payment is compellable at the suit of the creditors, though no assessment may have been made.—*Wilbur v. Stockholders of the Corporation*, 179.
2. Under proceedings in equity for this purpose, the court may, if a sufficient corporate organization continues to subsist, order an assessment by the corporate authorities upon the stockholders in any stage of the proceedings for any purpose for which it may be thought convenient. In such case it is only a proceeding in aid of the judicial recourse of the creditors; it may promote the enforcement, but is not essential to the existence of the obligation of the stockholders.—*Ibid.*
3. The bankrupt was a manufacturing company organized under a special act with a capital of fifty thousand dollars, divided into one thousand shares of fifty dollars each, with power to increase the number of shares to three thousand. The act prescribed no form or method of subscription to the stock, but authorized the payment of subscriptions in real or personal estate appropriate to the corporate business at a bona fide cash valuation, to be agreed upon by a majority in interest of the subscribers and stockholders. It gave no authority to the Directors or to any officer to accept payment for the stock except in money or money's worth. By the articles of association it was provided that the capital stock should be one hundred and forty thousand dollars, divided into two thousand eight hundred shares of fifty dollars each, and that the subscribers should give their notes, without interest, for the amounts subscribed by them respectively, which notes should not be liable, at any time, to an assessment for more than fifty per cent. of their face, nor to an assessment of more than twenty per cent. within eighteen months from the organization of the company. *Held*, That the true, legal, and only rational meaning of the provision was that, with ultimate relation to creditors, the capital was of the full residuary amount of one hundred and forty thousand dollars, but such calls for payments on the stock as might from time to time be made by the corporate authorities, in the course of the active business of the company, as a solvent concern, should not exceed one-half of that amount. There was nothing, therefore, in the articles of association to exempt or absolve stockholders from liability to creditors for so much of the whole capital of one hundred and forty thousand dollars as might be required for the payment of the debts.—*Ibid.*

4. Notes were given by most of the stockholders in payment for the stock subscribed for by them. Each of these notes conformed to the provisions of the articles of association, but contained a provision that all dividends should be credited proportionately upon it until its full amount, by reason of credits by assessments and dividends, should be paid, when the same should be returned and in lieu thereof a paid-up certificate of stock be issued. *Held*, that the operation of the articles of association as to creditors was not and could not be altered by the insertion of this provision in the notes.—*Ibid*.
5. The company having become bankrupt, and the deficiency of other assets exceeding the whole unpaid amount of the capital of one hundred and forty thousand dollars, *Held*, That the stockholders were liable to the assignee in bankruptcy for their respective proportions of such unpaid amount.—*Ibid*.
6. Stockholders of an insolvent corporation who are also creditors, cannot be allowed to deduct the amount due to them from their respective proportions of the unpaid capital; but if they prove their debts under the bankruptcy, deductions equal to their estimated respective dividends may perhaps be made from the amounts of the assignee's demands against them as stockholders.—*Ibid*.
7. Where an investment in stock by a corporation was *ultra vires*, the corporation will not be held liable as a stockholder.—*Ibid*.
8. A transferee of stock in a bankrupt company is liable to the assignee in bankruptcy in respect to such stock; but where the transfer was not accepted by the transferee, the transferer alone is liable.—*Ibid*.
9. Where the issue of shares of capital stock in a corporation, which is fraudulent in fact, appears formal and regular on its face, and the books of the corporation show that the shares are fully paid up, and there is nothing to put an innocent purchaser of such shares in open market upon inquiry, such purchaser cannot be held liable, but the remedy of the corporation is against the guilty perpetrators of the fraud in their individual capacity.—*Foreman v. Bigelow et al.*, 457.

COSTS.

See ATTACHMENT, 1; DISTRIBUTION, 4, 5.

CREDITORS.

See ACTION, 1; COMPOSITION, 52; INTERVENTION, 1; JURISDICTION, 8, 9.

DEMURRER.

See PLEADINGS, 1-3.

DEPOSITS.

1. The bankrupt procured a loan of fifteen thousand dollars through appellant's firm, who were insurance agents, and left six hundred and forty dollars and forty cents thereof in their hands to be applied as premiums upon policies to the amount of thirty thousand dollars, which he agreed to furnish in the

company represented by them as a mode of compensation for their services. He procured a policy for fifteen thousand dollars on his own life and one-half of the amount in the hands of appellant's firm was applied in payment of the premium on this policy. No other risks were furnished. In an action by the assignee in bankruptcy against appellant as survivor of his firm to recover the balance of the amount so left, *Held*, that the firm had a vested interest in the money and the assignee was not entitled to recover.—*Newcomb v. Launtz*, 276.

See ASSIGNEE, 3.

DISCHARGE

1. The liability of a factor for the proceeds of goods consigned to him for sale is released by his discharge in bankruptcy.—*In re Smith et al.*, 24.
2. One of the bankrupts was arrested under an order of arrest granted by a State Court in an action founded upon a claim against the bankrupts for the proceeds of goods consigned to them for sale as factors. *Held*, That he was entitled to be discharged from such arrest.—*Ibid.*
3. Old debts from which a bankrupt has been discharged are sufficient consideration for judgments subsequently confessed by him for the same indebtedness. Such judgments do not revive the bankrupt's liability upon the old debts, but they become new debts which are not affected by the discharge.—*Dewey v. Moyer*, 114.
4. Where the defendants in an action brought by creditors to set aside a fraudulent conveyance of the bankrupt desire to avail themselves of the fact that the title to such property had become vested in an assignee in bankruptcy, the fact of the appointment of such assignee, and the assignment to him, must be pleaded as a defense; a plea of discharge is not sufficient to raise that question.—*Ibid.*
5. While the certificate of discharge is conclusive evidence in favor of the bankrupt of the regularity of such discharge, it is not so in favor of other parties who seek to use it.—*Ibid.*
6. The requirement that the bankrupt shall keep proper books of account is satisfied if his creditors can gather from them a correct understanding of his business and financial condition.—*In re Antidel*, 289.
7. A discharge will not be refused upon the ground of material erasures and alterations in such books, unless they appear to have been made with fraudulent intent.—*Ibid.*
8. The conveyance by a merchant to his wife of a large amount of property, made at a time when he was heavily indebted in a losing business, and pressed by his creditors, and when a withdrawal of this amount of property from his assets was likely to prevent his meeting his obligations, cannot be supported by testimony that twenty years before his wife had advanced him money, without security or written obligation, under a simple verbal promise of repayment, which money he had invested in his own name and used to obtain credit in his business.—*Ibid.*
9. It appearing, however, that the cashier of the objecting creditor (a bank) had recovered judgment in his own name in a State court upon the claim proved by the bank; that he had afterwards filed a creditor's bill against

- the debtor and his wife, praying that these conveyances be set aside as a fraud upon creditors; that his bill was dismissed after a hearing upon the merits, and upon appeal to the Supreme Court this decree was affirmed, *Held*, That under these circumstances the matter was *res adjudicata* as between the objecting creditor and the bankrupt, and that the former was estopped to oppose his discharge.—*Ibid*.
10. Nor will the court of its own motion refuse a discharge, though it may appear that the bankrupt has committed an act which, if properly pleaded, would bar a discharge.—*Ibid*.
 11. Creditors who have been duly notified, and make no opposition, are regarded as consenting to a discharge.—*Ibid*.
 12. Where specifications are overruled upon grounds personal to the objecting creditor, time may be given to other creditors to appear and oppose a discharge.—*Ibid*.
 13. Where, by the terms of the lease, the bankrupt is liable to pay rent at fixed and stated periods, the rent is, under Section 5071 of the U. S. Rev. Stats., to be regarded as growing due from day to day; the discharge releases the bankrupt from liability for the proportionate part up to the time of the bankruptcy, but does not affect his liability for the part growing due after that time.—*Treadwell et al. v. Marden et al.*, 353.
 14. A voluntary general assignment for the benefit of creditors bears conclusive evidence upon its face of the intent of the assignor to prevent the property transferred by it from being distributed under the Bankrupt Act.—*In re Kasson*, 379.
 15. Such an assignment, although made in good faith and without preferences, is an act of bankruptcy and will defeat a discharge irrespective of the time when it was made.—*Ibid*.
 16. A discharge by virtue of compliance with the terms of a composition in bankruptcy is a discharge by operation of law, even as against an assenting creditor, and an indebtedness thus discharged is a sufficient consideration for a new and express promise to pay the original debt.—*In re Merriman's estate*, 411.
 17. The District Court which granted a discharge alone has jurisdiction of a proceeding to annul it; and *semble*, that such proceeding must be brought by the creditor, and may be brought at any time within two years from the discovery of the fraud for which it is sought to be set aside.—*Nicholas v. Murray et al.*, 469.
 18. In order to bar a discharge on the ground that the bankrupt swore falsely in the affidavit accompanying his schedules that he was indebted to a creditor named therein, or that he did not disclose to the assignee that the claim was false and fictitious, it must appear that he knew that the claim was false and fictitious.—*In re Blumenthal*, 555.
 19. The bankrupt kept proper books of account with customers, but it was conceded that he kept no books showing the transactions between himself and S. *Held*, That his dealings with S. were just as much a part of his business within the meaning of the statute as his dealings with his customers.—*Ibid*.
 20. The bankrupt carried on the business of butchering as agent and salesman

for one S. under a contract which provided that he should account daily with S. and pay over the moneys received until S. was reimbursed for his outlay. The transactions between the bankrupt and S. were entered daily by the bookkeeper of S. in a passbook, which was kept in the bankrupt's possession. *Held*, That such passbook was one of the bankrupt's books, and a proper book within the meaning of the statute.—*In re Blumenthal*, 575.

See COMPOSITION, 7; CONSIDERATION, 1; PRACTICE, 3, 4; PREFERENCE, 1.

DISTRIBUTION.

1. The bankrupts, as agents, consigned goods of the corporation for sale to an English firm, of which B. was a member. Prior to the receipt of the goods, said firm had accepted and paid drafts of the bankrupts to an amount exceeding the value of all their consignments, and on that account claim that they have accounted with the bankrupts and paid over the proceeds of the goods to them. *Held*, That this was not a payment which would discharge said firm from liability, and that the claim for such proceeds being for a partnership liability of B., ranks in the distribution of his individual estate after his individual debts.—*In re Barter & Ralston*, 62.
2. Where a debtor who had been discharged under composition proceedings in bankruptcy, gave to one of his creditors who had signed the resolution a new note for his old debt, and afterwards again went into bankruptcy, *Held*, That the claim so revived should not be postponed to those of the new creditors.—*In re Merriman's estate*, 411.
3. Under Section 4972 the District Court has power only to marshal assets according to priorities and rights which have been created or established by the act itself, or have been created by liens placed upon the assets by the act of one of the parties, or by operation of law, and has no power to discriminate between different classes of debts of the same legal character.—*Ibid*.
4. A claim by a landlord for use and occupation of premises by the marshal, for keeping and storing the goods, and costs on reference to adjust the amount of claim, are costs of administration, to be paid in full if the assets are sufficient; if not, to be paid *pro rata* with all other expenses of administration of the same class.—*In re Hoagland*, 530.
5. Costs of a claimant upon a reference to have the claim declared and enforced are to be paid out of the balance remaining after payment of all the expenses of administration.—*Ibid*.
6. The assignee cannot pay a claim for use and occupation of premises without an order of the court, and without ascertaining whether the assets are sufficient to discharge all the expenses of administration of the same class.—*Ibid*.

See PARTNERS, 1, 2.

DISTRICT COURTS.

See DISTRIBUTION, 3; JURISDICTION, 4, 6.

DOWER.

1. A sale of lands of a bankrupt by the assignee does not divest the dower of the bankrupt's wife.—*Lazear v. Porter*, 549.

ESTOPPEL.

See COMPOSITION, 46; DISCHARGE, 9; LIEN, 2; PARTNERS, 8.

EVIDENCE.

See COMPOSITION, 43; DISCHARGE, 5; PARTNERS, 8.

EXECUTIONS.

See LIEN, 1, 3, 5.

EXAMINATION.

1. Where a resolution of composition has been adopted and confirmed by the requisite number of creditors, the right of a creditor to examine the bankrupt under Section 5086 is suspended.—*In re Tift*, 177.

EXEMPTION.

1. A bankrupt is not entitled to a wagon and team as exempt from the operation of the Bankrupt Act under Section 14 thereof and Sec. 279, Sub. 3, of the Or. Civ. Code, unless he personally follows some trade, occupation, or profession, to the carrying on of which such wagon and team is necessary, nor unless he habitually earns his living by such trade, occupation or profession.—*In re Parker & Morris*, 43.
2. The *business* of mere buying and selling, or directing or employing the labor of others is not a *trade, occupation, or profession* within the statute; the statute was made for the benefit of those who live by their own labor, and require therefor the use of some of the articles enumerated therein.—*Ibid.*
3. An insolvent exchanged five hundred dollars worth of wheat for a wagon and team, with a view to claiming the latter as exempt from the operation of the Bankrupt Act. *Held*, That, under Sections 5129 and 5046 of the Act, the transaction was void, and the title to the wheat vested in the assignee. *Semble*, that the assignee may elect to take the wagon and team as the price or value of the wheat, and thereby affirm the exchange.—*Ibid.*
4. A merchant is entitled to two hundred dollars exemption of stock in trade in Wisconsin, under subdivision 9, Section 31, Chap. 134, R. S. of Wisconsin.—*In re Bjornstad*, 282.
5. In the absence of any fraudulent intent, partners may dissolve partnership, one partner sell his interest to the other, and the partner continuing in interest be allowed to claim his exemption from the stock, even though the partnership was owing debts in excess of their assets at the time of dissolution.—*Ibid.*

See CONTEMPT, 2.

FACTORS.

See DISCHARGE, 1.

FIDUCIARY DEBTS.

See COMPOSITION, 26.

FRAUD.

1. It is within the power and is the duty of the court to set aside summarily any process obtained by fraud and deception practiced upon itself. The exercise of this power is absolutely essential to the purity of the administration of justice.—*In re Keiler et al.*, 10.
2. Where verified petitions are presented purporting to be in the form required by law, and the petitioners know facts sufficient to put them on inquiry, and such verifications are false, such petitions will be summarily dismissed, and all concerned in preparing and presenting them will be subject to the grave consequences which result from the practice of fraud and deception on the court.—*Ibid.*
3. Co-petitioners cannot be held innocent of and not privy to the fraud and falsehood practiced in their name by their co-petitioners, unless their innocence clearly appears. Petitions in bankruptcy proceedings are to be considered as the joint act of all the petitioners.—*Ibid.*
4. A debtor's passive non-resistance to an action is not necessarily a fraud on the Bankrupt Act, although he may be insolvent in contemplation of that act.—*Louchheim v. Henzey*, 173.
5. Where one of the motives which prompts a conveyance by one member of a firm to his partner of his interest in such firm is to hinder and defeat creditors, such conveyance is fraudulent at common law, and is denounced by the express provisions of the Bankrupt Act, although other considerations may also have induced the conveyance.—*Burrill v. Lawry*, 367.
6. A creditor of the bankrupt having issued an attachment against him, defendant, who was the bankrupt's partner, procured a delay in its execution, and in the meantime purchased the bankrupt's interest in the firm for four hundred dollars, without taking account of stock or of firm debts and assets. The purchase money was returned to defendant, who placed it in a safe from which it was drawn out by the bankrupt from time to time as he called for it. In an action by the assignee in bankruptcy to invalidate the sale, defendant claimed that he purchased the bankrupt's interest for the sole purpose of getting rid of him and protecting his own interests. *Held*, That both parties to the transaction were chargeable with having contemplated the result accomplished thereby, and must be considered guilty of intending to hinder and delay this creditor in obtaining security for his demand.—*Ibid.*
7. A suit by an assignee to set aside a fraudulent conveyance, made by the bankrupt after his discharge, of property concealed prior thereto, is not a suit to annul such bankrupt's discharge, and may therefore be brought in the Circuit Court.—*Nicholas v. Murray et al.*, 469.

8. Such suit may be brought at any time within two years from the discovery of the fraud by the assignee or those whom he represents. — *Ibid.*
9. The estate of a bankrupt, after satisfying the valid claims against it, belongs to the bankrupt, and therefore a conveyance by him, alleged to be fraudulent as against creditors, will not be set aside on a suit by the assignee, where it appears that there are no debts provable against the estate. — *Ibid.*

See COMPOSITION, 8 ; DISCHARGE, 4.

INJUNCTION.

1. The injunction order issued on a creditor's petition should conform to the language of the statute. — *In re Keiler et al.*, 10.
2. The debtor filed a voluntary petition in bankruptcy, but objected to being adjudged bankrupt thereon, and no adjudication has ever been made. At the time of filing such petition he also filed a petition for composition. The first meeting of creditors has been held and the resolution of composition adopted and confirmed by the requisite number of creditors. Prior to the conclusion of such meeting, an opposing creditor commenced an action to recover a provable debt described in the debtor's statement, and levied an attachment upon his goods. On application for an injunction to restrain proceedings in such action, pending the proceedings in composition, *Held*, that the debtor is in no position to appeal to the court for protection so long as he objects to being a bankrupt and declines to surrender himself to the court. — *In re Tift*, 78.
3. *Semble*, That if the second hearing had been had and the resolution directed to be recorded, the case would be different. — *Ibid.*
4. In pursuance of the terms of a resolution of composition, an *ex parte* order was obtained from the State Court, discharging the voluntary assignee in so far as the decree confirming the composition affected the rights of the creditors, and the assignee thereupon delivered the property and books to the debtors. Subsequently a creditor who had refused to accept the composition notes, and whose debt was contracted by fraud on the part of one of the debtors, moved in the State Court for an inspection of the books, and to vacate the order discharging the assignee. *Held*, That the action of the creditor was a violation of the composition agreement, and under the power given the Bankrupt Court to enforce the agreement such action must be enjoined. — *In re Rodger et al.*, 381.
5. Upon a bill filed by an assignee in bankruptcy, the Circuit Court has power to enjoin the prosecution of an action of trover in a State court against the marshal for seizing the property of a third person under his warrant in bankruptcy. — *Hudson v. Schwab et al.*, 480.

See ALIMONY, 1 ; COMPOSITION, 56 ; MANDAMUS, 1.

INTEREST.

See COMPOSITION, 17.

INTERVENTION.

1. On the return of the order to show cause, certain creditors who had, since the filing of the petition, prosecuted to judgment actions against the alleged bankrupts, and made levies under their executions, moved for leave to intervene and contest the adjudication on the ground that the voluntary assignment which was alleged as the act of bankruptcy was void, having been executed by only three of the five partners, and in the firm name by one of the partners signing as attorney in fact for the firm, whereas, it was alleged, the partner so signing for the firm never held any power of attorney for that purpose. *Held*, That the motion must be denied; that the facts stated do not make a case of fraud or collusion to procure an adjudication to which the petitioning creditors are not in fact entitled, and that the fact that the moving creditors have made levies on the property since the filing of the petition gives them no rights as against the petitioning creditors different from that of creditors at large.—*In re Lawrence et al.*, 516.

See INVOLUNTARY BANKRUPTCY, 3, 9; PARTNERS, 9.

INVOLUNTARY BANKRUPTCY.

1. A petitioning creditor will not be permitted to withdraw where the rights of his co-petitioners will be injured thereby.—*In re Vogel & Reynolds*, 165.
2. A misrepresentation on the part of one of the debtors, by means of which a creditor was induced to join in the petition, will not entitle such creditor to withdraw, especially where such misrepresentation was not as to any matter of substance, nor intentionally false.—*Ibid*.
3. A creditor who has obtained an attachment after the filing of the petition and the issue of the order to show cause has no right to intervene and oppose an adjudication.—*Ibid*.
4. A publisher of a weekly newspaper is not a "manufacturer" within the meaning of the Bankrupt Act.—*In re The Capital Publishing Co.*, 319.
5. A petition, based upon a failure by the alleged bankrupt as a manufacturer to pay his promissory notes, which does not allege that such notes were made or passed in his alleged business as manufacturer, is defective.—*Ibid*.
6. A note for two hundred and fifty dollars, which falls due four days after the filing of the petition, is not a provable debt for two hundred and fifty dollars at the date of such filing.—*In re Riker*, 393.
7. An endorser of the bankrupt's paper who has, before the filing of the petition, become absolutely liable to the holders by due notice of its dishonor, is not a creditor of the bankrupt at the time of such filing.—*Ibid*.
8. On the objection that the petitioners in the original petition were insufficient in amount, a supplementary petition was filed by a creditor holding a claim exceeding two hundred and fifty dollars, and the debtor filed an admission that the petitioners in the two petitions constituted at least one-fourth of all his unsecured creditors whose provable claims equalled or exceeded two hundred and fifty dollars, and that the debts owing to

said petitioners amounted in the aggregate to at least one-third of all the debts provable against him by that class of creditors. *Held*, Insufficient to show that the requisite number and amount have joined; it is essential that the petitioning creditors whose debts equal or exceed two hundred and fifty dollars should be one-fourth of all that class of creditors. — *Ibid*.

9. While a creditor at large cannot intervene to contest an adjudication, he may very properly make a suggestion of suspicious circumstances, upon which the court will direct an inquiry to ascertain whether the petition is not collusively and fraudulently prosecuted. — *In re Hopkins*, 896.

See AMENDMENT, 1; FRAUD, 2, 3.

JURISDICTION.

1. The acts of the State Courts, done in the due exercise of their jurisdiction, not conflicting with the proper decrees and jurisdiction of the Federal Courts, are valid and binding on the Federal Courts. — *In re Keiler et al.*, 10.
2. The amendment of 1874 to Section 1 of the Bankrupt Act of 1867 did not confer or take away jurisdiction of the State Courts; its only effect is to allow the Federal Courts to decline to entertain actions at common law, to which the assignee is a party, in which the debt demanded is less than the amount which determines the jurisdiction of these courts in other cases. — *Kidder v. Horrobin*, 146.
3. A suit brought by an assignee in bankruptcy, to collect a debt due to the bankrupt, is not a matter or proceeding within the meaning of Section 711 of the Revised Statutes. — *Ibid*.
4. The District Court has jurisdiction of a controversy as to the ownership of a fund in the hands, or under the control of the assignee in bankruptcy, without regard to the residence of the parties in interest. — *In re Sabin*, 151.
5. Where it appears that a suit to determine adverse claims as to the ownership of a fund in the hands of the Bankrupt Court is pending, the court will detain such fund until the rights of the parties thereto have been determined in such suit. — *Ibid*.
6. The Bankrupt Court has no jurisdiction, under its summary power to enforce compositions, to take cognizance of and determine questions of title between the debtor and persons not parties to the proceedings; so, where composition proceedings were instituted without an adjudication and the resolution by its terms provided that upon payment of the composition all the debtor's property which he had before the commencement of the proceedings assigned for the benefit of his creditors should be restored to him, no suit having been brought to set aside such assignment, *Held*, That the court had no jurisdiction to compel the voluntary assignee to deliver the property to the debtor. — *In re Waitzfelder et al.*, 260.
7. Where the want of jurisdiction appears on the petition, the consent of the parties cannot give jurisdiction, and the court of its own motion should take notice of the point. — *In re Hopkins v. Carpenter et al.*, 339.
8. Where a debtor had, while insolvent, invested his means in the purchase of

property, and taken the conveyances in the name of his wife, and was afterward adjudicated a bankrupt, *Held*, that the State court had no jurisdiction of a suit brought by a creditor to set aside such conveyances and appropriate the proceeds of the property to the payment of his debt. Such rights and interests vest in the assignee in bankruptcy, and he is a necessary party to the suit.— *Winters v. Claitor*, 533.

9. Where a creditor whose claim is secured by mortgage has proved such claim in the bankruptcy proceedings, and the Bankrupt Court has made an order, upon application of a prior lienor, permitting the latter to sell the premises, and directing that the proceeds thereof, beyond the sum admitted to be due on such prior lien, abide the further order of the court upon hearing between the claimants of the fund, a State Court has no jurisdiction, after such sale, of a suit to foreclose the mortgage.— *Levy v. Haake et al.*, 544.

See ADJUDICATION, 2; DISCHARGE, 17.

LEASE.

1. While an assignee is bound to pay a reasonable compensation for the use of premises occupied by him in winding up the estate, he does not, by accepting the trust, become the assignee of leases belonging to the bankrupt, or bound to pay the rent reserved.— *In re Ives et al.*, 28.
2. To entitle the landlord to rent, the occupation of the assignee must be not merely technical, but substantial and beneficial to the estate.— *Ibid*.
3. Where the marshal kept some of the property seized by him on premises which had been leased by the bankrupt, *Held*, That the landlord was entitled to nothing by virtue of the covenants of the lease unless the assignee elected to take the lease and thereby became in fact the assignee thereof; that the estate was liable to the landlord before the appointment of the assignee, not on the ground of contract, but upon equitable considerations for a benefit conferred upon the estate, and the allowance is to be measured by the benefit thus conferred; ordinarily it is the value of the premises for storage of the goods, unless the circumstances are such as to make a greater expense proper.— *In re Wheeler & Lang*, 385.
4. An assignee is not bound to take a leasehold estate belonging to the bankrupt, unless it would be beneficial to the creditors for him so to do.— *White v. Griffing*, 399.
5. Where the assignee has accepted the lease, and has sold his interest as assignee in the leased premises to the lessor, the lease is thereby extinguished, and the guarantor of the lease discharged from all liability accruing after the commencement of the bankruptcy proceedings.— *Ibid*.
6. *Semble*, That a sale of the lease by the assignee, and the receipt therefor of a large sum of money for the benefit of the creditors involves an acceptance of the lease by the assignee.— *Ibid*.

LIEN.

1. Certain creditors obtained a judgment against the bankrupt, and issued execution thereon to the sheriff, who at that time was in possession of the goods

of the bankrupt under an attachment issued in an action begun by other creditors. No formal levy was made by the sheriff under the execution. Within an hour thereafter the bankrupt's voluntary petition was filed. *Held*, That there was a valid lien under the execution, which was not affected by the dissolution of the attachment.—*In re Hull*, 1.

2. The bankrupts made a general assignment for the benefit of creditors. Subsequently, and before the commencement of these proceedings, the sheriff, under an execution against the bankrupts, levied on the assigned property. The Bankrupt Court, upon application, permitted the sheriff to sell the property levied on and directed him to pay the proceeds to the assignee in bankruptcy, to be held subject to the lien of the execution, if any. After the petition was filed, but before an adjudication had been made, the voluntary assignee commenced an action of trespass against the sheriff to recover damages sustained by reason of the levy. The sheriff defended on the ground that the assignment was fraudulent and void as to creditors, and judgment was rendered in his favor. *Held*, That as to the sheriff the assignee in bankruptcy is in privity with the voluntary assignee, and is estopped by the judgment, and that the sheriff is entitled to the proceeds of sale under the execution.—*In re Biesenthal & Henschel*, 120.
3. Prior to the filing of the petition, certain creditors had delivered to the sheriff an execution against the bankrupts. Before the return day of the execution the assignee in bankruptcy took possession of the bankrupt's property, and the creditors, before such return day, proved their claim as secured by a lien by virtue of the delivery of the execution to the sheriff. No actual levy under the execution was made. *Held*, That the creditors had a valid lien which followed the property into the hands of the assignee; that such lien did not cease to exist until the return day of the execution, and that, as it existed when the claim was proved, a failure to make an actual levy before the return day did not extinguish it.—*In re Stockwell et al.*, 144.
4. In an action brought by plaintiffs against one P. and defendant as his trustee, judgment was rendered by default, execution issued thereon, and the sheriff made due demand on defendant for the property of P. in his hands and subsequently returned the execution *nulla bona*. After such demand, but before the return of the execution, P. filed a voluntary petition in bankruptcy, and was subsequently adjudicated a bankrupt. In an action to enforce defendant's personal liability on account of his failure to turn over the property to the sheriff after such demand, *Held*, That the bankruptcy of the debtor did not dissolve the plaintiff's lien on the property of the debtor in the possession of defendant as his trustee.—*Storer et al. v. Haynes*, 354.
5. An execution against the bankrupts was placed in the hands of the marshal previous to the commencement of the bankruptcy proceedings. *Held*, That this created a lien in the creditor's favor which is not affected by the bankruptcy; that it was immaterial whether the goods were the property of one of the partners individually or of the firm jointly, and that such lien is superior to that of the marshal for his charges in the pro-

ceedings other than those charges which relate to the goods upon which the lien attaches.—*In re Wheeler & Lang*, 385.

6. A judgment creditor does not acquire a lien protected under the Bankrupt Law by commencing proceedings supplementary to execution ; until the appointment of a receiver, his right is not a lien within the meaning of the Bankrupt Law.—*Ibid*.
 7. Decrees enrolled against a debtor are not liens upon property purchased by him, while insolvent, in the name of his wife ; but a court of equity will pursue for the benefit of creditors the means thus invested, and the lien in equity attaches on filing the bill.—*Winters v. Claibor*, 533.
 8. A creditor cannot obtain an equitable lien on the property interests of his debtor by a suit brought after the latter has been declared a bankrupt.—*Ibid*.
 9. A charterer of a vessel, having purchased supplies of a material man upon the credit of the vessel, afterward went into bankruptcy and proposed a composition with his creditors, which was accepted. *Held*, That the lien of the material man was not thereby discharged, even though he voted in favor of accepting the composition.—*The "Home,"* 557.
 10. Money furnished to a vessel is not a lien, unless it be furnished for the purpose of paying claims which would themselves be liens.—*Ibid*.
- See ASSIGNMENT FOR CREDITORS, 1 ; ATTACHMENT, 2, 3, 4.

LIMITATION.

1. The limitation in the Bankrupt Act, in relation to suits by and against assignees, applies to a suit in equity brought by the assignee of a bankrupt corporation to charge the shareholders for the unpaid amount of their shares ; and the statute begins to run from the time the estate vested in him as assignee.—*Foreman v. Bigelow et. al.*, 457.
- See DISCHARGE, 17 ; FRAUD, 8 ; PROOF, 6, 9

MANDAMUS.

1. Certain creditors having petitioned that a firm be adjudicated bankrupt, the marshal seized under his provisional warrant a lot of goods alleged to belong to a third party, who thereupon brought suit in trover against the marshal and four of the petitioning creditors in a State court. Upon a bill filed in the Circuit Court by the assignee in bankruptcy, the marshal, and the four creditors to set aside the sale to such third party as fraudulent, an injunction was ordered, staying his action in the State court. On application for a mandamus to vacate such injunction, *Held*, That as the injunction was granted in a cause over which the court had clear jurisdiction, a writ of mandamus would not lie to vacate it, and that the remedy was by appeal from the first decree.—*Ex parte Schwab*, 507.

MARSHAL.

See INJUNCTION, 5 ; WARRANT, 2.

MISTAKE.

See COMPOSITION, 16 ; SCHEDULE, 1.

MORTGAGE.

1. The bankrupt, more than two months before the petition was filed, executed and delivered to defendant, his brother, a mortgage to secure pre-existing debts, but through the negligence of the bankrupt, to whom defendant entrusted it for record, it was recorded within that time. By the laws of the State the mortgage was not "good and effectual in law to hold such lands against any other person but the grantor and his heirs only," without being recorded. In an action by the assignee to set aside such mortgage, *Held*, That it was not fully made as against the assignee until it was recorded, and as that was within two months of the filing of the petition, it was void.—*Bostwick v. Foster*, 123.
2. In 1872 the bankrupt sold certain government bonds belonging to his sister, which were then in his hands, and out of the avails paid and took up a mortgage note which then fell due, secured on certain real estate, and kept the balance to his own use. At that time he also owed his sister for a balance of interest he had previously received and had other government bonds of hers which he had or afterwards pledged for his debts. During the following six years he paid her money from time to time, which was charged against the interest received by him upon her bonds and not otherwise applied by either. *Held*, That she was entitled to be treated as if she had held the mortgage from the time he took it up; that the payments should be applied upon the interest and not to the balance of avails of the sale, and that she was entitled to a lien equivalent to a mortgage lien for the payment of the sum found to be due to her after application of such payments.—*Dewey v. Kelton*, 217.

See JURISDICTION, 9.

NATIONAL BANKS.

1. The bankrupt B. held certain shares of stock of the defendant, a National Bank. The bank claimed a lien on such stock, under its by-laws, to secure an indebtedness due it from the bankrupts. This by-law, the assignee claimed, was void under the National Banking Law, and upon refusal of the bank to give him, as assignee, a certificate for these shares, brought action for their value. *Held*, That as judgment for conversion vests the title to the converted property in the wrong-doer, and the wrong-doer in this case cannot hold the title, the assignee cannot maintain the action in this form.—*Meyers v. Valley National Bank*, 34.
2. The bank purchased a quantity of its stock on the market, and not having the right to hold it in its own name, divided it among some of the directors. The bankrupt B., who was one of the directors, took some of this stock and gave his note therefor, the bank retaining the certificate for him, although the stock was transferred to him on the books, and he received dividends thereon. On his failure the bank caused him to trans-

fer the stock to its teller, but retained the note as an asset. In an action by the assignee to set aside the transfer as a preference, *Held*, That the bank had lawfully no stock to convey, and that B. was not the lawful owner.—*Ibid*.

NEGOTIABLE PAPER.

See BANKRUPT, 4.

PARTNERS.

1. Joint creditors share equally in joint assets, whether their debts are partnership debts or not.—*In re Nims & Long*, 91.
2. The bankrupts were formerly partners under the firm name of O. L. Nims & Co., and failed without assets. Shortly thereafter they commenced business again as partners, under the firm name of O. L. Nims, agent, and failed, leaving assets. *Held*, That the creditors of the old firm were entitled to share equally with the partnership creditors in the partnership assets.—*Ibid*.
3. Where there is an undoubted partnership, oral evidence is admissible to prove that the factory in which the partners carried on their business, and upon which they expended their money, was a part of the capital stock contributed by them; and where such evidence is clear and undisputed, and admitted to be true, the property in question is to be treated in bankruptcy as the property of the firm; if on no other ground, then clearly on that of part performance.—*In re Farmer et al.*, 207.
4. Where, in a voluntary petition of partners in trade, the names of any of the copartners are withheld, creditors cannot supply the omission, because in voluntary proceedings the law provides for a proceeding *in invitum* against non-joining parties only at the instance of their petitioning associates.—*Citizens' National Bank v. Cass*, 279.
5. Such omission will not affect the rights of creditors against partners who are not parties to the proceeding. The law leaves them in possession of all remedies against parties not joined which they had before.—*Ibid*.
6. If any are excluded who ought to be joined, the court will refuse to the petitioning parties the benefit of the act, and leave them, as well as their associates who refused to join, subject to all the remedies to which their creditors might resort, irrespective of the bankruptcy proceedings.—*Ibid*.
7. So long as there are undistributed partnership assets and partnership debts or liabilities, the firm may be adjudicated bankrupt.—*In re Gorham*, 419.
8. As between himself and the firm creditors, one member of a firm cannot estop himself by any dealings with his partner from any duty he owes these creditors.—*Ibid*.
9. A firm in which one G. was a partner having expired by limitation, the interests of the other partners were transferred to him by bills of sale, and at the same time he entered into an agreement to faithfully apply the firm assets to the payment of the firm debts. He afterwards filed a voluntary petition in bankruptcy and included the firm assets and debts in his schedule. *Held*, That the other members of the firm had a right to

intervene and have the firm adjudicated, to the end that the firm assets might be applied to the payment of the firm debts.—*Ibid.*

10. The bankrupt entered into a contract with one S., by which he undertook to carry on the butchering business for S. as his agent and salesman. The contract provided that the "offal, feet, and the commission on hides and the usual slaughter-house perquisites" were to go to S., and the bankrupt was to receive, in lieu of wages, all he could make over and above the current price of cattle bought after deducting all expenses. It was also provided that the bankrupt should account daily with S., and pay over to him all moneys received, until S. was fully reimbursed for the stock and expenses. *Held*, That the agreement did not create a partnership.—*In re Blumenthal*, 555.

See ADJUDICATION, 1, 2; EXEMPTION, 5; FRAUD, 5.

PAYMENT.

See DISTRIBUTION, 1; PROOF, 5.

PETITION.

See AMENDMENT; INVOLUNTARY BANKRUPTCY, 4-9; FRAUD, 2, 3; PARTNERS, 4-6.

PLEADINGS.

1. A demurrer for want of equity will not lie to a bill that is not deficient in substance, although for some technical reason—as the lapse of time or want of jurisdiction in the court—the relief sought for cannot be attained in that suit.—*Nicholas v. Murray et al.*, 469.
2. A demurrer that a bill does not state facts sufficient to constitute a cause of suit is unknown to chancery practice, and at most is nothing more than the general demurrer for want of equity.—*Ibid.*
3. An objection to a bill, in which the complainant describes himself as an assignee, that he is not legally such assignee, must be made by plea, and not demurrer.—*Ibid.*

See AMENDMENT, 2; DISCHARGE, 4.

POWERS.

See ASSIGNEE, 2.

PRACTICE.

1. All objections to specifications should be raised by the exceptions first filed.—*In re Duncan et al.*, 42.
2. Where the court has sustained the exceptions in certain respects, it must be deemed to have disallowed them in all other respects, and they cannot afterwards be renewed, unless the amendment allowed is, in effect, the making of a specification substantially different from the former one.—*Ibid.*
3. The adjudication in this case was made in November, 1873. A petition for discharge had been filed in August, 1875. The present petition for dis-

charge was filed in November, 1876. It was objected that the court had no jurisdiction to grant the discharge, on the ground that a prior petition for discharge was still pending and undetermined. *Held*, That the objection was frivolous; that no discharge could have been granted on the prior petition because not seasonably made, and that the proceedings under it were abandoned when this petition was filed.—*In re White et al.*, 106.

4. Whenever an objection to a discharge rests on facts, there must be a specification in order that the bankrupt may produce evidence and that there may be a trial of the fact.—*Ibid*.
 5. The Code of New York has no application to bankruptcy proceedings.—*In re Ford & Co.*, 426.
 6. A submission of a claim by stipulation to the register to hear and determine is not in the nature of an arbitration or a reference under the New York Code, and the decision of the register in such case is not final or conclusive, but is subject to the review of the court.—*Ibid*.
 7. Before adjudication in an involuntary proceeding, a composition was proposed by the debtor which was accepted and confirmed but was subsequently set aside on account of the inability of the debtor to carry it into effect. After the petition to set the composition aside was filed, but before the order thereon was made, the debtor filed his voluntary petition and was duly adjudicated. *Held*, that the pendency of the first proceeding, no adjudication having been made therein, was no bar to the right of voluntary petition secured by the act to the debtor; that proceedings should be continued in the case in which an adjudication was made, and that the proceedings in the involuntary case should be stayed.—*In re Flanagan*, 439.
 8. The general rules and orders made by the Supreme Court under authority of the Bankrupt Law were designed to systematize and facilitate the practice of the Bankrupt Courts, and so far as they apply must be strictly followed; but they were not designed to nor do they create or declare the rights of creditors in the estates of bankrupts, still less do they abrogate and annul those rights.—*In re Baxter & Ralston*, 560.
 9. The receiver of a corporation, having presented proof of a claim against the bankrupt with no deposition in support thereof, as required by G. O. 34, the claim was re-examined and held valid, and leave given to the receiver to amend by producing the deposition of an officer of the corporation. The receiver applied to the proper officer, who refused to make the deposition. On the re-examination of the claim the treasurer of the corporation was examined under oath, and his deposition was a part of the case on which the decision sustaining the claim was made. *Held*, That under the circumstances the receiver should be permitted to file the deposition of the treasurer, made upon the re-examination, with the same force and effect as if originally made as a deposition under G. O., 34.—*Ibid*.
- See ADJUDICATION, 3; COMPOSITION, 2, 3, 4, 12, 13, 15, 18-21, 25, 39; CONTRACT, 1; DISCHARGE, 7, 10, 12.

PREFERENCE.

1. The bankrupts were members of a firm engaged in the lumber business, with their principal place of business at A., in this State. They were also members of other firms engaged in the same business in Canada, but in each of such firms there was another partner, at least nominally. The creditors of the Canadian firms having threatened legal proceedings to sequester the property of those firms in Canada, transfers of said property were made by way of mortgage to such creditors in consideration of advances to carry on the business and to secure payment of the debts of the Canadian firms. This course was recommended by some of the principal creditors of the firm in this State, at an informal meeting of the creditors, as the best thing to be done under the circumstances. It appeared that the transfers were made in good faith. *Held*, That under the circumstances the transfers were not preferences within the meaning of the act so as to deprive the bankrupts of their discharge.—*In re White et al.*, 106.
2. The mere fact that the debtor brought or caused goods to be brought within reach of the execution a short time before the sheriff's sale, which was closely followed by the commencement of proceedings in bankruptcy against him, is not sufficient under the Bankrupt Act to invalidate the sale.—*Louchheim v. Henzey*, 173.
3. Where a sale has been made under two judgments it is not invalidated by the fact that the debtor, with a desire to prefer either plaintiff, failed to make a defence which by law he was entitled to make.—*Ibid*.
4. The defendant bank was a creditor of the bankrupt by note of four thousand dollars, and was at the same time indebted to the bankrupt on deposit account to the amount of four thousand five hundred dollars. Prior to proceedings in bankruptcy, and on the day before the maturity of the note, the defendant, having knowledge of the insolvency of the bankrupt, received from the bankrupt a check for four thousand dollars, and thereupon surrendered the note, and by the transaction to that extent reduced the amount of the deposit account, in favor of the bankrupt, upon the books of the defendant. *Held*, That the transaction was an adjustment of mutual debts within the meaning of Section 5073, Rev. Stat., and not a fraudulent preference within the meaning of Section 5128.—*Robinson v. Wisconsin M. & F. Ins. Co. Bk.*, 243.
5. Payments to the Government, although with intent to give a preference, are not forbidden by the Bankrupt Act.—*Tiffany et al. v. Morrison*, 365.
6. A deputy U. S. revenue collector becoming insolvent, subsequently and within four months of his adjudication as a bankrupt, paid over to defendant, his principal, moneys received by him in the line of his duty as such officer. *Held*, That such payment was not an unlawful preference within the meaning of Section 35 of the Bankrupt Act.—*Ibid*.

See PROOF, 2.

PRIORITY.

1. An attachment issued in an action commenced by one A. was levied upon certain lands of the debtor. Subsequently an execution issued upon a judgment recovered by one B. was levied upon the same lands. A. afterwards obtained judgment, and an order was issued thereon to sell the lands attached. The debtor having filed a petition in bankruptcy, the sale was enjoined. The assignee in bankruptcy afterwards sold the lands, and the proceeds proved insufficient to pay both judgments. *Held*, That the process issued on A.'s judgment was not affected by Section 5044; that the assignee, in fact, took nothing, and that A. was entitled to priority.—*Hudson v. Adams*, 102.
 2. A claim of the landlord for rent, for which, by the laws of the State, he had a lien on goods which have been seized by the marshal, is a preferred claim so far as the proceeds of such goods will go.—*In re Hoagland*, 530.
 3. By the terms of a resolution of composition the bankrupts were authorized to continue their business in the firm name under the direction of a committee. The committee wrote to one C., who afterwards sold goods to the firm, that it was understood that all debts incurred after the composition should be paid in full before any payment should be made on the old indebtedness, but that the committee were not in any event to be personally liable. The business was carried on for a year, and resulted disastrously, the original assets being much diminished during that time, and no new assets acquired. *Held*, That C. was not entitled to payment in full in preference to the old creditors.—*In re Brightman et al. Ex parte Cox et al.*, 566.
- See DISTRIBUTION, 1-3.

PROOF.

1. The bankrupts were the general business agents of a corporation, and as such were authorized to receive and disburse all the moneys of the corporation "except subscriptions to its capital stock." B., one of the bankrupts, who was treasurer of the corporation, received subscriptions to the capital stock, which he paid into the business of his firm. It did not appear that any stockholder or director of the corporation except B. and his partner had any knowledge of the misappropriation of the funds. *Held*, That B. was liable personally therefor; that the firm, having taken the funds with knowledge that it was not entitled to receive the same, was equally liable, and that proof could be made against both estates.—*In re Baxter & Ralston*, 62.
2. The assignee recovered a judgment against a creditor for the value of goods taken by him, prior to the bankruptcy, in payment of his indebtedness. The creditor afterwards paid the amount of such judgment and costs, and proved his debt in the bankruptcy proceedings. On motion to expunge the claim, *Held*, That such payment was a surrender of the preference, and that, in the absence of actual fraud, the creditor had a right to prove his claim.—*In re Newcomer*, 85.

3. The holder and owner of a claim can alone make the proof.—*In re Ford & Co.*, 426.
 4. A note which is subject to an offset for a larger amount is not a provable debt.—*Ibid.*
 5. The claim of one of the creditors was upon two notes given by the bankrupts to a firm of which the claimant was a member, for debt due to the firm, secured by a pledge of stock. The firm afterwards surrendered to the bankrupts a large number of notes, and signed an agreement to take up and surrender others, including the ones in question, and received from the bankrupts a cash payment, which, it was agreed, with the stock held by them, should be taken in satisfaction of the debt. *Held*, That the notes were paid.—*Ibid.*
 6. The Statute of Limitations of the State where the bankrupt resides applies to the proof of debts against his estate; and such statute continues to run against such debts after the adjudication in bankruptcy, and therefore no claim can be proven or enforced against such estate, unless an action could be maintained thereon in the courts of such State.—*Nicholas v. Murray et al.*, 469.
 7. In an action brought by the bankrupt against one B., the defendant interposed a counterclaim. The bankrupt having been adjudicated before the trial of the action, B. offered no evidence in support of his defence, and judgment was rendered against him. *Held*, That B. was not thereby precluded from proving his claim in the bankruptcy proceedings.—*In re The People's Safe Deposit, & Co., Inst.*, 493.
 8. The bankrupts drew certain drafts upon their correspondents in Liverpool, who accepted the same. The drafts were drawn against consignments of merchandise, which the bankrupts agreed to, but failed to make. After the dishonor of the drafts, the holder received from the acceptors fifty per cent. of the amount due on them, in full release of all claims against such acceptors, but without prejudice to the rights of the holder against other parties. The acceptors subsequently released all claims against the bankrupt. *Held*, That the holder of the drafts had a right to prove against the bankrupts for the whole amount of the drafts.—*In re Baxter & Ralston*, 497.
 9. A debt against which the statute of limitations has run, but which is included in the debtor's schedules is provable in bankruptcy.—*In re Hertzog*, 528.
- See ALIMONY, 1; INVOLUNTARY BANKRUPTCY, 6; PRACTICE, 9; SUBSCRIPTIONS, 1.

REGISTER.

1. The register has power to make a valid adjudication in an involuntary case where the alleged bankrupt has made default.—*In re De Ford*, 454.
2. The register has no power to adjourn a meeting of creditors by letter, or otherwise than by attending the meeting at the time and place designated for its assembling.—*In re Dickinson*, 514.
3. The warrant in this case was returnable on September 15th, but the register was prevented from attending at said time by the prevalence of yellow

fever. Being absent from the city, and a portion of the time from the State, he made orders of adjournment, and forwarded them to his assistant. *Held*, That the meeting wholly failed, and that a new warrant should issue appointing another meeting, to be served as if no warrant had ever been issued.—*Ibid*.

See COMPOSITION, 28, 44; PRACTICE, 6.

RENT.

See DISCHARGE, 18; DISTRIBUTION, 4, 6; LEASE, 1, 2; PRIORITY, 2.

RES ADJUDICATA.

See DISCHARGE, 9.

SALE.

1. The bankrupt, being the owner of twenty bonds of like character and value held by a bailee, sold six of said bonds to defendant and received pay therefor prior to the bankruptcy. *Held*, That the rights of the purchaser to these bonds were superior to those of the assignee in bankruptcy.—*Hamilton v. National Loan Bank*, 97.
2. It is imperative under the statute that notices of all *public* sales shall be published for three consecutive weeks, whether the assignee or other officer proceeds under the power given him by the statute or under a special order of the court, and there is no power in the court or judge to change this requirement.—*In re Hunter*, 504.

See DOWER, 1; PREFERENCE, 2, 3.

SCHEDULE.

1. The provision of the Bankrupt Law in relation to the correction of inadvertent mistakes in the schedule has reference to material mistakes, as the omission of some debt, or of the name of some creditor.—*Beebe v. Pyle*, 162.

SET-OFF.

1. Nothing can be set-off under Section 5073 against the principal of a debt due a creditor, except a debt due from the creditor to the bankrupt.—*In re Purcell*, 447.
2. Where the bankrupt had given a creditor his accommodation notes to an amount larger than the claim of such creditor, which were discounted and afterwards proved against the estate by the holders, *Held*, That an assignee would have the right to set-off the dividend paid upon the notes against the dividend due such creditor and recover from him the balance of the amount so paid, and the same equitable right obtains in the case of a composition.—*Ibid*.

SETTLEMENT.

See ASSIGNEE, 4; WIFE OF BANKRUPT, 1-3.

STATE COURTS.

See JURISDICTION, 1, 2, 8, 9.

STAY.

1. To entitle the bankrupt to a stay of suit pending a determination on his petition for a discharge, the proceedings in bankruptcy must be plead or brought to the knowledge of the court in a proper manner.—*Holden v. Sherwood*, 111.
2. In suits before justices of the peace this may be done by motion, based on the transcript of the proceedings in bankruptcy.—*Ibid.*
3. On appeal from a justice's judgment a motion to stay suit on the ground of bankruptcy comes too late after verdict; it must be made before trial.—*Ibid.*
4. The mere filing of a petition in bankruptcy by a debtor is no bar to the prosecution of an action against him in a State court.—*Murphy v. Young*, 505.
5. A stay of a proceeding, subsequent to final judgment, for the purpose of putting in motion the remedy of arrest which is reserved to the creditor, is not allowable under §§ 5106, 5107, U. S. R. S.—*In re Whitney*, 563.
6. Prior to the commencement of the proceedings in bankruptcy, a surrogate's decree was docketed against the bankrupt for the payment of moneys misappropriated by him as administrator, and an appeal taken from a decision of the surrogate refusing an application for a commitment of the bankrupt for failure to pay. Upon such appeal, pending the bankruptcy proceedings, the decision of the surrogate was reversed, and the proceedings remitted to him to enforce the proper remedy against the person of the bankrupt. *Held*, That the proceedings could not be stayed under Section 5106 so as to prevent an application to the surrogate for a commitment.—*Ibid.*

See ACTION, 1; ALIMONY, 1.

STOCKHOLDERS.

See CORPORATIONS, 1-3, 5-9; LIMITATION, 1.

STOPPAGE IN TRANSITU.

1. The right of stoppage *in transitu* depends upon the fact that the goods have not come to the actual or constructive possession of the vendee, and it is not necessary that the obstacle which has prevented this should be one that was purposely interposed by the vendor for this purpose, nor that it was one created by him directly or indirectly. Even where the seller has ceased to have any control of the goods and they are in the custody of the Government awaiting the payment of duties, the right of stoppage *in transitu* remains.—*In re Bearn*s, 500.

2. L. & Co. contracted to sell to the bankrupt one thousand and five hundred cases of wine, "to arrive," at a fixed price per case, less duties. The bonded warehouse in which the wine was stored on arrival was selected by the bankrupt, but it was stored in the name of L. & Co. Nine hundred cases were withdrawn by the bankrupt before his failure, L. & Co. signing on the withdrawal entry an authorization to him, as required by the regulations of the Treasury Department, to withdraw the goods described therein. After the filing of the petition in this case, L. & Co. withdrew the remaining six hundred cases, and paid the warehouse charges on the whole one thousand and five hundred cases. The note given by the bankrupt for the amount of the purchase fell due after his failure, and was not paid. On application to expunge proof of claim for the nine hundred cases, on the ground that L. & Co. had no right to take the remaining six hundred cases, and that the assignee could set off their value, *Held*, That the right of stoppage *in transitu* still existed as to the six hundred cases, and that the giving of the authorization to withdraw a part of the goods was such a separation by consent of the parties of that part from the rest that a delivery of that part is not to be considered a constructive delivery of the whole or as affecting the right of stoppage *in transitu* as to the remaining part.—*Ibid*.

SUBSCRIPTION.

1. In order to carry out more fully the objects of its organization, the Denison University, in 1865, proceeded to raise an endowment fund of one hundred thousand dollars, and the bankrupt subscribed two thousand dollars thereto. In the following year, the University having succeeded after great expense in raising the full amount of such fund, the bankrupt gave his note in satisfaction of his subscription. He subsequently subscribed five hundred dollars toward erecting a new building for the University, and paid one hundred dollars thereon. The building was erected on the faith of this and other subscriptions. Shortly after this second subscription the bankrupt executed and delivered to the University a note, secured by mortgage, for seven thousand and five hundred dollars, the amount being made up of the amount of his former note, the balance due on the second subscription and money borrowed of the University. In a proceeding by the assignee to settle and declare the amount and priority of liens and for a sale of the bankrupt's property, a supplementary petition was filed asking that so much of the University's claim as was made up of the voluntary gifts of the bankrupt be set aside. *Held*, That the claim was valid; that if it was founded upon the original subscriptions it would be good; but in this case the original subscriptions had been settled, satisfied, and paid by the notes, and that after such changes and settlements every presumption is in favor of the transaction, and the court will not go behind it.—*Sturgis v. Colby*, 168.

SUPPLEMENTARY PROCEEDINGS.

See *LIEN*, 6.

SURETYSHIP.

1. Where a creditor, who has knowledge of his debtor's insolvent condition, accepts payment of his debt, in fraud of the Bankrupt Law, without the consent of the surety or indorser, the latter is thereby discharged from liability, although the assignee of the debtor subsequently recovers back such fraudulent payment.—*Northern Bank of Kentucky v. Cooke*, 306.

SURROGATES.

See STAY, 6.

TITLE.

See CONTRACT, 1; EXEMPTION, 3.

TRADESMEN.

See EXEMPTION, 2.

TROVER.

See INJUNCTION, 5.

USURY.

See ASSIGNEE, 1.

WARRANT.

1. The bankrupt was adjudicated upon his own petition. He remained in possession of his assets and disposed of a portion of them, and expressed an intention of going to Europe for the purpose of adjusting his foreign accounts, which constituted a considerable portion of his assets. He had expressed an intention of offering a composition, but had presented no application therefor to the court, and declared that his affairs were so confused, especially his foreign accounts, that he was unable to do so. *Held*, That the case was a proper one for a provisional warrant.—*In re Hale*, 335.
2. The marshal has no authority under a provisional warrant to make a seizure of property outside of his district.—*Carr v. Phillips*, 527.

WIFE OF BANKRUPT.

1. The bankrupt, at a time when free from debt and without contemplation of bankruptcy, conveyed to his wife, without the intervention of a trustee, certain parcels of land to her separate use free from his control. By the deeds conveying the property he expressly reserved to himself a power of revocation in whole or in part, and of appointment to any such uses or persons as he might designate either by deed or last will. *Held*, That

the settlement would be upheld as against the assignee in bankruptcy of the husband.—*Jones v. Clifton*, 125.

2. The omission to insert a power of revocation in a voluntary settlement will subject the settlement to more or less suspicion.—*Ibid*.
3. When a settlement is made by a husband free from debt, when it is induced by no fraudulent motive, when it makes no more than a reasonable provision for the wife, when it confers *any* benefit on her, a court of equity will uphold it. Though the grant may not contain every provision which a chancellor would direct to be inserted in a settlement ordered by himself, though it contains reservations tending to impair the full benefit of the provision made for the wife, yet if the grant confer any substantial benefit on her, so long as she is in the actual enjoyment of that benefit a court of equity should and will protect her.—*Ibid*.

See ASSIGNEE, 4 ; DISCHARGE, 8 ; DOWER, 1.

WITNESS.

See COMPOSITION, 28.

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